(1)

88-164

No. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE WEYERHAEUSER COMPANY, Petitioner

v.

RUBEN BRACAMONTES, REYES PEREZ and
PABLO MARTINEZ, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Myron Timothy Boe
Jim Hunter Birch
Rose Law Firm
A Professional Association
120 East Fourth Street
Little Rock, AR 72201
(501) 375-9131

ATTORNEYS FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

Whether the court below improperly engaged in judicial legislation by expanding coverage of the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), 29 U.S.C. § 1801, et seq., to workers engaged exclusively in forestry in disregard of the plain language of the statute and long standing agency interpretation?

LIST OF AFFILIATES

Pursuant to Rule 28.1, The Weyerhaeuser Company lists the following subsidiaries (excluding wholly-owned subsidiaries) and affiliates:

(1) Camac Veneer, Inc., an Oregon Corporation;
(2) Mountain Tree Farm Co., a Washington corporation;
(3) North Pacific Paper Corporation, a Delaware corporation;
(4) Pacific Veneer, Ltd., a Washington corporation;
(5) GNA Corporation, a Washington corporation;
(6) Premier Relocation Services, Inc., a California corporation;
(7) Tri-Wall Containers Limited, an Israeli corporation;
(8) Tri-Wall K. K., a Japanese corporation;
(9) Pacific Hardwoods, SDN. BHD., a Malaysian corporation; and
(10) Filam Forest Products, SDN. BHD., a Malaysian corporation.

PARTIES TO PROCEEDING BELOW

A. Plaintiffs/Appellants

Ruben Bracamontes
Reyes Perez
Pablo Martinez

B. Defendants/Appellees

The Weyerhaeuser Company
Mario Rodriguez
Guadalupe Rodriguez
Isabel Rodriguez
South Tex Reforesters
Juan Sendejo

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REFERENCE TO OPINIONS BELOW

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Bracamontes v. Weyerhaeuser, Docket Number 87-2456, 840 F.2d 271, rehearing and rehearing en banc denied, 845 F.2d 1022 (5th Cir. 1988).

JURISDICTION OF SUPREME COURT

(i) Date of Judgment sought to be reviewed:

March 22, 1988.

(ii) Rehearing and Rehearing En Banc denied:

April 25, 1988.

(iii) (Not Applicable.)

(iv) Jurisdiction of the Supreme Court is conferred by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pursuant to Sup. Ct. R. 21.1(f), Petitioner hereby sets out verbatim the pertinent portion of the Migrant and Seasonal Agricultural Workers Protection Act, 28 U.S.C. § 1802 (3), at issue:

> (3) The term "agricultural employment" means employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 29 U.S.C. 203(f), or section 3121(g) of title 26 and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

STATEMENT OF THE CASE

On February 27, 1987, Plaintiffs/Respondents Bracamontes, Perez, and Martinez ("Plaintiffs") filed this action under the Migrant and Seasonal Agricultural Workers Protection Act (MSPA) against Defendant/Petitioner The Weyerhaeuser Company ("Weyerhaeuser") and Defendant South Tex Reforesters ("South Tex") in the United States District Court for the Southern District of Texas, Brownsville Division. Plaintiffs allege jurisdiction of the District Court based on 29 U.S.C. § 1854(a), 28 U.S.C. § 1331, and 28 U.S.C. § 1337. Plaintiffs asked the District Court to force Weyerhaeuser's compliance with the "non-employer related confirmation of registration obligation under AWPA [MSPA]". Complaint, ¶ 2 (App. D). Plaintiffs claim they were "migrant agricultural workers" under 29 U.S.C. § 1802(8). Complaint, ¶ 5 (App. D). In order to be migrant agricultural workers, plaintiffs must be engaged in "agricultural employment" as defined by MSPA. 29 U.S.C. § 1802(3).[1]

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[1]Prior to the filing of the instant suit, South Tex requested an opinion from the Department of Labor ("DOL"), as to whether South Tex forestry operations were covered by MSPA and whether South Tex would be required to register as a farm labor contractor under MSPA. In response to Defendant South Tex' request on February 24, 1987, DOL Administrator Paula V. Smith opined:

> It is the position of the Department [of Labor] that forestry and reforestration workers are not engaged in agricultural employment within the meaning of MSPA and are therefore not covered by the Act.
>
> In view of this position, you and your associates who employ workers to engage in the forestry operations named in your letter would not be subject to the registration requirement of MSPA." (App. E). (Emphasis added).

To comply with the Ninth Circuit Court of Appeals' injunctive decision in Bresgal v. Brock, 833 F.2d 763, opinion modified, 843 F.2d 1163 (9th Cir. 1987), the DOL changed its enforcement policy on February 17, 1988.

On April 15, 1987, the District Court granted Weyerhaeuser's Motion to Dismiss, because MSPA did not apply to parties engaged exclusively in forestry activities. (App. B).

Plaintiffs appealed the dismissal to the United States Court of Appeals for the Fifth Circuit. Acknowledging "the question is a close one and either of the interpretations argued are plausable", the three judge Panel[2] reversed Bracamontes v. Weyerhaeuser, 840 F.2d 271, 272, rehearing denied, 845 F.2d 1022 (5th Cir. 1988), (see App. A). Thus, "agricultural employment" under MSPA was expanded to include the employment of migrant workers to plant pine seedlings in forests.

In reviewing the District Court's dismissal of the case under Fed. R. Civ. P. 12(b)(6), the facts alleged in the Complaint must be assumed to be true. As alleged in the Complaint, Weyerhaeuser contracted with Defendant South Tex, and its owners, to perform tree planting on Weyerhaeuser lands along the Mississippi/Alabama border between 1984 and 1987.

South Tex recruited workers from the Rio Grande Valley of Texas to perform this work and transported those workers to Alabama. It is undisputed the plaintiffs' work on Weyerhaeuser's lands was limited exclusively to the planting of pine seedlings, and they were engaged exclusively in forestry. See Complaint at ¶ 32 (App. D).

MSPA was enacted to replace the Farm Labor Contract Registration Act ("FLCRA"), formerly codified at 7 U.S.C. § 2041, et seq. FLCRA was first enacted in 1963. Coverage under FLCRA was limited to interstate activity, hence the definition:

> "'interstate agricultural employment' means employment in any service or activity included within the provisions of § 3(f) of the Fair Labor Standards Act ["FLSA"]. . . . or § 3121(g) of the Internal Revenue Code of 1954 ["IRC"]."

Pub. L. No. 88-582 § 3, 78 Stat. 920, Sept. 7, 1964 (formerly codified at 7 U.S.C. § 2042(d), set out in History following 7 U.S.C. § 2042 (1979 Vol.)). See also 29 C.F.R. Parts 40, 41.

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[2]Honorable Circuit Judges Timbers, King and Higginbotham comprised the Panel.

The definition of "agricultural employment" at issue here was first enacted as a 1974 amendment to the FLCRA, then adopted without alteration when the MSPA was enacted. See 7 U.S.C. § 2042(d); Pub. L. No. 93-518 § 2, 3, 88 Stat. 1652, Dec. 7, 1974. FLCRA defined "migrant worker" without reference to the term "agricultural employment." Rather, the FLCRA, both before and after the 1974 amendments, defined such workers by reference to FLSA and IRC. 7 U.S.C. § 2042(g) (1979 Vol.). The DOL issued regulations in its administration of the FLCRA, codified at 29 C.F.R. Parts 40, 41.

The MSPA definition of "agricultural employment", upon which Plaintiffs' case is based, is the same as the definition which existed under the FLCRA. The core of the definition incorporates by reference, without restating, terms first used in the FLSA and the IRC.

MSPA seeks to correct abuses of, and provide protections for, workers of a migrant and seasonal nature employed in agriculture. Pub. L. No. 97-470, 96 Stat. 2584 (1983), codified at 29 U.S.C. § 1801-1872. The workers protected by MSPA are expressly limited by the definitions set out at 29 U.S.C. § 1802, many of which are based on the definition of "agricultural employment", stating in relevant part as follows:

> (3) The term "agricultural employment" means employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 29 U.S.C. § 203(f), or section 3121(g) of title 26 and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state. [Emphasis Supplied].

29 U.S.C. § 1802(3). Utilizing that definition, "migrant agricultural worker" is then defined, with certain exceptions not relevant here, as "an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence." 29 U.S.C. § 1802(8)(A) (emphasis added). Similarly, "seasonal agricultural worker" is defined as "an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not

required to be absent overnight from his permanent place of residence . . . " 29 U.S.C. § 1802(10)(A) (emphasis added). Regulations implementing the MSPA are published at 29 C.F.R. Part 500.

In analyzing the above definition, the Fifth Circuit dissected § 1802(3) into three separate "prongs":

(1) employment in any service or activity included within the provisions of Section 3(f) of the FLSA;

(2) employment in any service or activity included within the provisions of Section 3121(g) of the IRC; and

(3) the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

The Fifth Circuit found forestry work is excluded from the definition of agricultural employment under the first two prongs of the above definition (i.e., "forestry" is expressly excluded from "agriculture" under long standing regulations applicable to the FLSA and IRC). 840 F.2d at 272-73. However, the Court of Appeals found the 1974 amendments to the FLCRA which added the so-called "third prong" of the above definition expanded the Act's coverage so as to include forestry by implication within the definition of "agricultural employment". 840 F.2d at 273-74.

The Court of Appeals based its expansion of MSPA through the 1974 FLCRA amendment on a statement in a Senate committee report which was made, not in reference to the "third-prong" amendment on which the Court of Appeals based its expansion, but during a discussion of the bill generally. The report states:

> The Committee has been informed by the Commissioner of the Immigration and Naturalization Service that some government agencies have permitted the employment of illegal aliens as tree planters, thinners and other forest laborers by awarding contracts to forestry contractors who regularly employ aliens who have illegally entered the United States. The provisions of this bill and its penalties are intended to apply to such contractors. The Committee urges the appropriate authorities to investigate this matter and to take all steps necessary to assure that such contracts are not awarded to these contractors.

See, S. Rep. No. 1295, 93d Cong., 2d Sess. 4 (1974) as reprinted in [1974] U.S. Code Cong. & Admin. News, 6441, 6444-46.

The Court of Appeals also based its finding upon a remedial policy consideration:

> . . . [i]t is inconceivable that Congress intended to protect workers planting fruit trees in an orchard, and to disregard workers planting fir trees on a hillside, when both groups suffer from the same clearly identified harm.

Bracamontes, 840 F.2d at 275 (quoting Bresgal, 833 F.2d at 766).

ARGUMENT

The FLCRA and the MSPA extend coverage only to those engaged in "agricultural employment". From the plain language of 29 U.S.C. § 1802(3) and 29 U.S.C. § 203(f), forestry or lumbering activities are not included within the definition of "agricultural employment", unless they are performed by a farmer on a farm. Otherwise, forestry activities are excluded from the FLCRA and the MSPA.

By holding forestry is included within the definition of "agricultural employment" under the MSPA, the Court of Appeals performed a legislative, rather than interpretative, function by amending MSPA. Regardless of the merits of a policy, judges should not amend an act of Congress. This is especially true where the intent of Congress is plain and unambiguous. See, Laborer's Health and Welfare Trust Fund of Northern Cal. v. Advanced Lightweight Concrete Co., ___ U.S. ___, 108 S.Ct. 830, 837 (1988). ("Laborer's Health Fund"). This expansion of the Act's coverage is beyond the province of the judiciary. Id.

The Court of Appeals disregarded the clear intent of Congress and held forestry workers are engaged in "agricultural employment" under MSPA. The Court's holding is contrary to several canons of statutory construction: The Court of Appeals ignored the clear language of the Act and based its holding, to a large extent, on a single

ambiguous statement in the legislative history[3] of the FLCRA; the Court of Appeals failed to afford due deference to the longstanding Department of Labor ("DOL") interpretation of MSPA so as to exclude forestry from the definition of "agriculture"; and the Court of Appeals' decision repeals a portion of MSPA by implication and renders that portion superfluous.

The Court of Appeals' reliance upon Bresgal v. Brock, 833 F.2d 763 (9th Cir. 1987), is equally contrary to the canons of statutory construction. The reasoning upon which the Bresgal decision (and ultimately the Fifth Circuit's decision) relied is unworthy of the weight given it.

A. By Expanding MSPA Coverage to Include Forestry Workers the Court of Appeals Performed a Legislative Function which is Beyond the Province of the Judiciary.

The Court of Appeals stated it is "inconceivable" Congress intended MSPA coverage for certain migrant workers and not others. 840 F.2d at 275. However, a line delineating the extent of MSPA coverage inevitably must be drawn. MSPA does not deal with all situations falling within the general mischief which gave rise to the legislation.

Congress, in enacting the Fair Labor Standards Act, for example, did not exercise the full extent of its power. It did not intend to cover every source of activity or enterprise that might in some form or fashion, at some time or other, have some bearing upon the production of goods by someone. Parham v. Austin Co., 158 F.2d 566, 567-68 (5th Cir. 1946). "Congress did not intend that the regulation of hours and wages should extend to the farthest reaches of federal authority." McLeod v. Threlkeld, 319 U.S. 491, 493 (1943). See also, Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207, 211 (1959).

Similarly, as shown by its legislative history, MSPA is not co-extensive with the limits of the power of Congress over commerce. The purpose of MSPA is ". . . to remove the restraints on commerce

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[3]A thorough examination of the legislative history associated with consideration and passage of the 1974 FLCRA amendment shows Congress' intent was to expand coverage only vertically to all steps in the production chain, but not horizontally to growing operations not previously covered. See Part II.D. infra.

caused by activities detrimental to migrant and seasonal agricultural workers. . . ." 29 U.S.C. § 1801. (Emphasis added). For example, Congress could have considered and enacted coverage of MSPA to all migrant and seasonal workers, without restriction to agriculture. But, it did not.

When lines have to be drawn, they are bound to appear arbitrary when judged solely by borderline cases. See, 10 East 40th Street Building, Inc. v. Callas, 325 U.S. 578, 580 (1945). The distinction made between agricultural workers and forestry workers for purposes of MSPA coverage may appear to the Fifth Circuit to be arbitrary. But, so is a decision to include "agricultural employment" but exclude non-agricultural employment. The line-drawing necessary to state the extent of MSPA coverage is properly the function of Congress, not the judiciary.

Despite the clear language of the statute, the absence of any express intent on the part of Congress to extend MSPA coverage to forestry workers and years of agency interpretation excluding "forestry" from "agriculture," the Court of Appeals stated: "The suggested narrow reading of § 203(f) [of FLSA] to the MSPA would disserve the Act's remedial purpose." 840 F.2d at 276. Thus, the Court of Appeals based its reasoning upon policy considerations, i.e., that exclusion of forestry from MSPA coverage was inconsistent with the Act's purpose. Even in interpreting remedial statutes, the Court must look to the plain meaning of the statute. Accordingly, in Laborer's Health Fund, supra, this Court rejected an expansion of remedies under the Employment Retirement Income Security Act, §§ 502(g)(2) and 515, 29 U.S.C. §§ 1132(g)(2) and 1145, stating:

> Our principal reason for rejecting these arguments is our conviction that Congress' intent is so plain that policy arguments of this kind must be addressed to the body that has the authority to amend the legislation, rather than one whose authority is limited to interpreting it. We nevertheless note that there are countervailing policy arguments that make it highly unlikely that the limited reach of the statute is the consequence of inadvertence rather than deliberate choice.

Laborer's Health Fund, 108 S.Ct. at 837.

The Court of Appeals reasoned that including forestry within MSPA was consistent with the Act's purpose of preventing farm labor contractor exploitation of migrant and seasonal laborers. 840 F.2d at 274-75. This reasoning ignores the fact that Congress did not bring all agricultural workers within MSPA in spite of the possibility that all agricultural workers may be subject to the same evils. See, 29 U.S.C. § 1803(a). Reliance upon the "similar abuse" theory also ignores the fact that longstanding remedial labor standards acts, such as the FLSA and NLRA, (840 F.2d at 276), included forestry workers, but not agricultural workers. Thus, forestry workers have available remedies from which agricultural workers are precluded.

It is improbable that Congress, through the 1974 FLCRA Amendments, intended to extend coverage to the forestry and timber business, one of our largest industries (Complaint at 16-19, App. D), without expressly so stating. It is inconceivable Congress would expand FLCRA and MSPA coverage by mere implication as found by the Court of Appeals. "Forestry is a common word. Legislators know it, and can use it. They did not." Bresgal, 833 F.2d at 774 (9th Cir. 1987), (Anderson, J., dissenting).

B. The Court of Appeals Failed to Give Due Deference to the Longstanding Department of Labor Interpretation of "Agricultural Employment" Excluding Forestry from that Definition.

1. The Department of Labor's Interpretation of "Agricultural Employment" Need Only Be Reasonable To Be Entitled To Deference.

It is axiomatic the DOL's interpretation of MSPA, for which it has primary enforcement responsibility (See 29 U.S.C. § § 1802(11), 1853, 1855, 1861, 1862, 1863, and 1872), need not be the best one by grammatical or any other standards. As this Court has noted:

> [The] view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of [the statute] is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency] (emphasis added)

Chemical Mfr. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985). See also E.E.O.C. v. Commercial Office Products Co., ___ U.S., ___, 108 S. Ct. 1666, 1671 (1988); and Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980).

The DOL's exclusion of forestry from the definition of agricultural employment is indeed reasonable. Courts in numerous jurisdictions have examined, in various contexts, whether forestry and related functions are included within the definition of "agriculture." For example in Appleman v. Employment Division, 21 Or. App. 186, 534 P.2d 218 (1975), the court held:

> We cannot view the raising of commercial timber seedlings as being an operation which is commonly regarded as associated with farming in its "traditional sense" regardless of whether the seedlings are sold to others or retained and raised for timber. Although, as the court explained in [Just-A-Mere Farm, Inc. v. Peet, 247 Or. 413, 430 P.2d 987 (1967)] it is not uncommon to refer to timber as a "crop," the growing of trees, and in this seedlings, is not understood in the common parlance as an agricultural operation.

Id., 534 P.2d at 220. See also, N.L.R.B. v. Scott Paper Co., 440 F.2d 625, 626 (1st Cir. 1971), (Woodsmen employed to fell, top, limb and buck trees and then haul them to a pick-up area were not "agricultural workers," expressly exempted from the NLRA.)

Other cases which exclude forestry operations from the definition of agriculture include Plumfield Nurseries, Inc. v. Dodge County, 184 Neb. 346, 167 N.W.2d 560, 563, (1969); Sniegowski v. Bureau of Unemployment Compensation, 11 Ohio App. 2d 73, 228 N.E.2d 679, 681 (1966); and Kirby Lumber Corp. v. Hardin Independent School Dist., 351 S.W.2d 310, 312 (Tex. Civ. App. 1961).

The DOL's interpretation of "agriculture" to exclude forestry is indeed reasonable. "In common parlance, the commercial logging industry is not ordinarily thought to be an agricultural industry nor are commercial loggers and forestry workers considered to be agricultural laborers." Bresgal, supra, 833 F.2d at 774 (9th Cir. 1987) (Anderson, J., dissenting).

A reasonable agency interpretation of an act bears particularly

great weight, if the agency assisted in drafting the statute. Miller v. Youakim, 440 U.S. 125, 144 (1979). The DOL was involved in drafting the 1974 FLCRA Amendments which added to the definition of "agricultural employment" as well as the drafting of MSPA. S.Rep.No. 93-1295, 93rd Cong. 2d Sess. (1974), reprinted in [1974] U.S. Code Cong. & Adm. News 6441, 6445.

2. The Fact Congress Knew The DOL's Interpretation of "Agricultural Employment" Excluded Forestry When It Re-enacted FLCRA and MSPA Is Persuasive of Congress' Intent.

The judicial analysis in the instant case should closely parallel that of this Court in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). In Bell Aerospace, this Court dealt with interpretation of Section 2(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 152(3), which provides for exclusion of certain employees from NLRA coverage. It was argued that even though persons employed as buyers were properly classified as "managerial employees," they were nonetheless entitled to NLRA protections. Bell Aerospace, 416 U.S. at 270-71.

The Court rejected this argument and held all employees properly classified as "managerial" positions are excluded from NLRA coverage. Id., 416 U.S. at 275. The NLRB interpreted Section 2(3) of the NLRA to exclude all managerial employees from the Act's coverage for more than two decades, before Congress subsequently re-enacted the same provisions without pertinent change. In so holding, the Court stated:

> [A] court may accord great weight to the long standing interpretation placed on a statute by an agency charged with its administration. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). This is especially so where Congress has re-enacted the statute without pertinent change. Zemel v. Rusk, 381 U.S. 1, 11-12 (1965). In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress. Zemel v. Rusk, supra, at 11-12.

Bell Aerospace, supra, 416 U.S. at 275. Accord, United States v. Rutherford, 442 U.S. 544, 544 (1978); and CBS, Inc. v. FCC, 453

U.S. 367, 382 (1980), ("Such deference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives."). See also Zenith Radio Corp. v. United States, 437 U.S. 443, 457 (1978).

Application of the foregoing reasoning to the instant case can lead only to the conclusion the DOL's longstanding interpretation of "agriculture" to exclude forestry is the one intended by Congress for purposes of MSPA coverage.

The Department of Labor interpretative regulations in existence and followed for forty years exclude "forestry" from the definition of "agriculture." That interpretation was first codified in 1947 at 29 C.F.R. § 780.60 et seq. (1947). As relevant here, 29 C.F.R. § 780.62 (1947) (12 Fed. Reg. 5961-62, (September 9, 1947)), states:

> While "agriculture" is sometimes used in a broad sense as including the science and art of cultivating forests, its application has been limited in Section 3(f). The language of that section clearly indicates that forestry and lumbering operations are practices which will be considered agricultural only if "performed by a farmer on a farm as an incident to or in conjunction with such farming operations." [Emphasis added]

The current applicable regulations are substantively identical. 29 C.F.R. § 780.200. Additionally, the current regulations, at 29 C.F.R. § 780.115, state:

> Trees grown in forests and the lumber derived therefrom are not "agricultural or horticultural commodities." Christmas trees, whether wild or planted, are also not so considered. It follows that employment in the production, cultivation, growing, and harvesting of such trees or timber products is not sufficient to bring an employee within Section 3(f) unless the operation is performed by a farmer or on a farm as an incident to or in conjunction with his or her farming operations. [Emphasis added]

These agency interpretations of "agriculture" and "agricultural or horticultural commodity" were in existence at the time Congress passed the FLCRA in 1963, the amendment to the FLCRA in 1974 and MSPA in 1983. Courts will generally presume presume

Congress is knowledgeable about existing law pertinent to the legislation it enacts. Goodyear Atomic Corp. v. Miller, _____ U. S. _____, 108 S. Ct. 1704, 1711-12 (1988).

For nine years subsequent to the 1974 amendments to the FLCRA, the DOL continued to interpret the statute so as to exclude forestry workers from the definition of "agricultural employment." Congress did not indicate, either in the text of MSPA or in the legislative history pertinent to the definition of "agricultural employment", a desire to change the DOL's interpretation.

> From 1974 to the present, the crucial provisions and language of the Act have remained the same. The Act was thoroughly reviewed by Congress in 1983, yet no changes were made to extend the Act to commercial forestry and logging operations. Forestry is a common word. Legislators know it, and can use it. They did not. Bresgal, 833 F.2d at 774 (9th Cir. 1987), (Anderson, J., dissenting) (Emphasis added).

Thus, as shown by Judge Anderson, Congress understood the ordinary usage of "agriculture" and "forestry", but did not include "forestry" within "agriculture" in FLCRA or MSPA.

The Fifth Circuit acknowledged the DOL's interpretation of the MSPA excluding forestry from agriculture was entitled due deference. 840 F.2d at 276. After noting deference is due, the Court of Appeals ignored the DOL interpretation excluding forestry from coverage under MSPA. Id. Although the DOL, under FLSA, always exempted agricultural employment from its provisions, the Court of Appeals stated:

> The Supreme Court has declared that FLSA exemptions should be construed narrowly, which DOL recognizes. Relatedly, the MSPA is remedial in nature and must be read broadly. The suggested narrow reading of § 203(f) to the MSPA would disserve the Act's remedial purpose.

Id., 840 F.2d at 276 [footnotes omitted].

The Court of Appeals acknowledged the DOL interpretation, but based its reasoning upon policy considerations [i.e., that the DOL's interpretation was inconsistent with the MSPA's purpose]. However, such ". . . policy arguments . . . must be addressed to the

body that has the authority to amend the legislation, rather than one whose authority is limited to interpreting it." Laborer's Health Fund, supra, at 837.

C. The Definition of "Agricultural Employment" Is Clear and Unambiguous on the Face of MSPA. The Court of Appeals' Reliance on MSPA's Legislative History Is Inappropriate.

MSPA defines "agricultural employment" as follows:

> (3) The term 'agricultural employment' means employment in any service or activity included within the provisions of Section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 203(f)), or Section 3121(g) of Title 26 [FICA] and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

29 U.S.C. § 1802(3). [Emphasis added]

Before the Fifth Circuit, Weyerhaeuser argued the 1974 FLCRA amendments expanded coverage to intrastate, as well as interstate commerce and also added coverage for employment involving the processing of agricultural commodities in an unmanufactured state. The 1974 amendments expanded coverage vertically to all steps in the production chain of products previously covered by the FLSA and IRC definitions, but not horizontally to growing operations not previously covered, such as forestry.[4] As the Court of Appeals stated:

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[4]Weyerhaeuser's argument is supported by the Fifth Circuit's holding in Almendarez v. Barrett-Fisher Co., 762 F.2d 1275, 1281 (5th Cir. 1985), ("We perceive the purpose of the amended act to have been to check, as fully as possible, the abuses of the middlemen between farmers and migrant workers. The very reason for the 1974 amendment was to implement this purpose more fully by expanding the coverage of the act to include persons such as packing shed operators. S.Rep. No. 93-1295, 93rd Cong., 2d Sess. (1974), reprinted in [1974] U.S. Code Cong. & Adm. News 6441, 6448."). This is a vertical, not horizontal interpretation of the Act.

"The question is a close one and either of the interpretations urged are plausible." 840 F.2d at 274.

The Court of Appeals acknowledged its interpretation of the 1974 amendment goes beyond the plain meaning of MSPA:

> The vertical expansion of the act is plain, but it is not plain that Congress intended more.

840 F.2d at 275. (Emphasis added).

Therefore, any horizontal expansion by the Court of MSPA coverage constitutes clear judicial legislation.

Despite the admitted lack of facial ambiguity in the MSPA, the Court of Appeals relied heavily upon MSPA's legislative history to conclude the 1974 amendment expanded coverage to forestry workers[5].

Where, such as here, the language of a statute is clear and unambiguous, it is unnecessary and improper to look toward the legislative history for help in defining legislative intent. Escondido Mutual Water Co. v. La Jolla Indians, 466 U.S. 765, 772 (1984); and United States v. Oregon, 366 U.S. 643, 648 (1961). "Reliance on legislative history in divining the intent of Congress is, as has often been observed, a step to be taken cautiously." Piper v. Chris-Craft Industries, 430 U.S. 1, 26 (1976).

"[A] statute clear and unambiguous on its face, need not and cannot be interpreted by a court and only statutes which are of doubtful meaning are subject to the process of statutory interpretation." Sutherland, Statutory Construction § 45.02 (4th Ed. 1985). The Court of Appeals' extensive reliance upon legislative history, 840 F.2d at 274, instead of the statutory language, was inappropriate for determination of Congress' intent in amending the FLCRA in 1974.

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[5]The Court of Appeals did not address the lack of facial ambiguity in MSPA, but went directly to the legislative history. 840 F.2d at 274. The legislative history relied upon by the Court of Appeals is that of the 1974 amendments to the FLCRA—not the current statute, MSPA. Nowhere in the legislative history of MSPA is there any express indication Congress intended the definition of "agriculture" to include forestry.

D. MSPA's Legislative History Indicates Congress' Intent Was To Expand Coverage Only Vertically.

The Senate Report on the 1974 FLCRA amendments, summarizing the legislation, notes it "extends the Act's coverage," and goes on to state that it:

> "[D]eletes the Act's limitation of coverage by including intrastate ... transactions .... The bill also adds coverage for employment involving the processing of agricultural commodities in an unmanufactured state. [emphasis added]

S. Rep. 93-1295, 93d Cong., 2d Sess. 5-6 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 6441, 6447 (emphasis added). The same Senate Report, discussing the specific section of the bill contained the amendment at issue, stated:

> Section 3 amends section 3(d) of the Act providing coverage to all aspects of commerce in agriculture, including that defined in either the Fair Labor Standards Act ..., and other processing of agricultural or horticultural commodities in an unmanufactured state.

Id. at 8, 1974 U.S. Code Cong. & Ad. News at 6448 (emphasis added).

The House Report contains virtually the same description of the way in which the bill is "extending the coverage of the Act," stating that "[t]he bill also adds coverage for employment involving the processing of agricultural commodities in an unmanufactured state." H.R. Rep. No. 93-1493, 93d Cong. 2d Sess. 1 (1974) (emphasis added). See also, S. Rep. 93-1295 at 8, describing the amendment as "providing coverage to all aspects of commerce in agriculture, including ... other processing of agricultural or horticultural commodities in an unmanufactured state."

Virtually identical descriptions of the way in which this amendment "expanded" the Act's coverage are contained in the floor debates when the first version of the bill containing the amendment was introduced. Cong. Rec. S18127 (daily ed. October 3, 1974) (introducing the Senate version of the amendment); Cong. Rec. S18130 (daily ed. October 3, 1974) (stating that the amendment

"also adds coverage for employment involving the proceeding [sic] of agricultural commodities in an unmanufactured state").

Neither the language of the 1974 amendment, nor the legislative history discussing that aspect of the bill, establishes any intent to expand the definition of "agricultural and horticultural commodities" to include forestry work as found by the Court of Appeals. To the contrary, as both the language and the legislative history make clear, Congress retained the language "agricultural or horticultural commodity" long interpreted to exclude forestry. The expansion merely encompassed various aspects of the processing of these materials, traditionally considered agricultural and horticultural commodities, in intrastate transactions.

E. The Court of Appeals' Interpretation of MSPA Renders a Portion of the Act Superfluous.

By interpreting the so-called "third prong" of MSPA's definition of "agricultural employment" to include all forestry operations within that definition, the Court of Appeals ignores the first two prongs of the definition. The first prong of the MSPA, Section 3(f) of the FLSA, unambiguously states forestry and lumbering operations are covered only when they are "performed by a farmer on a farm as an incident to or in conjunction with farming operations." 29 U.S.C. § 203(f). Inclusion of forestry and lumbering operations only if performed by a farmer on a farm becomes superfluous if, as the MSPA is interpreted by the Court of Appeals, all forestry operations are deemed to be within the MSPA's definition of "agricultural employment." "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." Sutherland, supra at § 46.06. A repeal by implication is disfavored by the law and should only be found when provisions of a statute are irreconcilable. Kremer v. Chemical Construction Corp., 456 U.S. 461, 467 (1982).

Even if MSPA's definition of "agricultural employment" included only the so-called "third prong" on which the Court of Appeals relies, the definition can only be interpreted to exclude forestry from coverage under the Act. The third prong defines "agricultural employment" as certain activities relating to an

"agricultural or horticultural commodity in its unmanufactured state." As noted by the Court of Appeals, the DOL's regulations expressly exclude timber products, etc. from the definition of "agricultural or horticultural commodity":

DOL specifically has stated that "[t]rees grown in forests and the lumber derived therefrom are not 'agricultural or horticultural commodities'. . . ." (emphasis added)

840 F.2d at 273, n. 7.

F. The Court of Appeals' Reliance upon Bresgal v. Brock is Inappropriate.

The Court of Appeals relies heavily upon Bresgal v. Brock, supra, a two to one decision containing a vigorous, well-reasoned dissent by Judge Anderson.[6] The reasoning of the majority opinion in Bresgal is based, in large part, upon the opinion of District Judge Burns in Bresgal v. Brock, 637 F.Supp. 271 (D. Or. 1985). The foregoing comments regarding the Fifth Circuit's reasoning in the instant case are equally applicable to the reasoning of the District Court in Bresgal. The cases relied upon by Judge Burns in Bresgal are entitled to little, if any, weight.

Judge Burns relied heavily upon a March 19, 1984 interlocutory opinion in Aguirre v. Davis Forestry Corp., Civ. B-81-142 (S.D. Tex.), (App. F) which, upon reconsideration by Judge Vela of the Southern District of Texas was overturned. Aguirre v. Davis Forestry, B-81-142 (S.D. Tex. March 13, 1987). (App. G). In an Order dated March 13, 1987, Judge Vela rejected his entire March 19, 1984 Order relied on by Bresgal, and granted Davis

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[6]In a dissenting opinion, Judge Anderson stated, inter alia: "The specific intent found by the majority is not expressed in the language of the Act. It derives from a stray remark by the Senate that 'the provisions of this bill and its penalties are intended to apply to such contractors.' 1974 U.S. Code Cong. & Adm. News at 6441, 6444. This issue was not addressed by the House nor was the remark or its substance included in the 1974 or 1983 Amendments. If anything, this stray remark indicates Congress' awareness of the difference between forestry and agricultural workers. The fact that there was no further mention or discussion of this issue suggests to me that the inclusion of forestry workers was considered and rejected by Congress." Bresgal, supra, 833 F.2d at 774-75. (emphasis added)

Forestry's Motion for Summary Judgment. Instead, Judge Vela adopted Magistrate William M. Mallet's finding that FLCRA (MSPA's predecessor) was clear and unambiguous on its face. (App. G):

> [T]he plain language of the FLCRA itself demands such a recommendation, and it would be beyond this Court's jurisdiction to encroach upon the legislative responsibilities granted to Congress by the Constitution (emphasis added).

Aguirre v. Davis Forestry Corp., supra, (App. G).

Likewise, Judge Burns' reliance upon Davis Forestry Corp. v. Smith, 707 F.2d 1325, 1328 n. 3 (11th Cir. 1983), does not support the inclusion of forestry within FLCRA or MSPA. In Davis, the sole issue was the standing of a competitor of an alleged farm labor contractor to challenge his noncompliance with the FLCRA. Davis held plaintiff had no standing and dismissed the case, eliminating the necessity for determination of whether the parties were farm labor contractors under FLCRA. Id. at 1328. Certainly, reliance upon mere dictum to overturn years of DOL interpretation and reach a construction of MSPA contrary to the clear meaning of the statute is unfounded.

V. CONCLUSION

Congress could have included forestry activities within FLCRA or MSPA. It plainly did not. Policy arguments to expand MSPA's coverage to forestry should be addressed to Congress. Congress, not the courts, should make the important policy decision to expand MSPA to forestry, one of our nation's largest industries. Weyerhaeuser petitions this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and reverse the Circuit Court's decision in Braçamontes v. Weyerhaeuser, Docket Number 87-2456, 840 F.2d 271, rehearing and rehearing en banc denied, 845

F.2d 1022 (5th Cir. 1988).

Respectfully submitted,

ROSE LAW FIRM
A Professional Association
120 East Fourth Street
Little Rock, AR 72201
(501) 375-9131

By:
Tim Boe

By:
Jim Hunter Birch

Walter Passmore
Ewers, Toothaker, Ewers,
Abbot, Talbot
Hamilton & Jarvis
111 Nolana,
P.O. Box 3670
McAllen, Texas 78501

CERTIFICATE OF SERVICE

I, Tim Boe, do hereby certify that I mailed copies of the above and foregoing Petition for Writ of Certiorari to Marc Linder, Texas Rural Legal Aid, Inc., 259 South Texas, Weslaco, TX 78596, Ronald Hole, Atlas & Hall, P.O. Drawer 3725, McAllen, TX 78502, and Walter Passmore, Ewers, Toothaker, Ewers, Abbot, Talbot, Hamilton & Jarvis, 1111 Nolana, P.O. Box 3670, McAllen, TX 78501, on this 21 day of July, 1988.

Tim Boe

Supreme Court, U.S.
FILED
AUG 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE WEYERHAEUSER COMPANY,
Petitioner,

v.

RUBEN BRACAMONTES, REYES PEREZ, and PABLO MARTINEZ,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

David G. Hall
Counsel of Record
Marc Linder
TEXAS RURAL LEGAL AID, INC.
259 S. Texas
Weslaco, TX 78596
(512) 968-9574
Counsel for Respondents

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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IN THE

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THE WEYERHAEUSER COMPANY,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Fifth Circuit in *Bracamontes v. The Weyerhaeuser Co.*, 840 F.2d 271 (5th Cir.), *reh'g denied*, 845 F.2d 1022 (5th Cir. 1988). The opinion of the district court is unreported. *Bracamontes v. The Weyerhaeuser Co.*, No. B-87-029 (S.D. Tex. Apr. 15, 1987), Pet. App. B.

STATEMENT OF THE CASE

Respondents are three migrant workers from the Rio Grande Valley of Texas who, during the winter

of 1986, planted pine seedlings in forests owned by The Weyerhaeuser Co. in Mississippi and Alabama. They filed this case as a class action against Weyerhaeuser and several of its crewleaders in 1987 for violations of the registration, disclosure, record-keeping, transportation and housing provisions of the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. §§ 1801-1872 (Supp. 1988). Plaintiffs requested that the court enjoin Weyerhaeuser from using crewleaders who had not been authorized by the United States Department of Labor to recruit, transport, drive, or house migrant agricultural workers.

The district court dismissed the action on the ground that "agricultural employment" did not comprehend forestry within the meaning of AWPA. *Bracamontes v. The Weyerhaeuser Co.*, No. B-87-029 (S.D. Tex. Apr. 15, 1987), Pet. App. B. The Fifth Circuit reversed on appeal. Unanimously holding that "Congress intended that agricultural employment include forestry operations even when not performed on a traditional farm," the Court of Appeals ruled that "appellants, who planted pine seedlings for Weyerhaeuser, are migrants as defined by the Act and consequently are entitled to its protection." *Bracamontes v. The Weyerhaeuser Co.*, 840 F.2d 271, 276 (5th Cir.), *reh'g denied*, 845 F.2d 1022 (5th Cir. 1988).

Weyerhaeuser filed its petition for writ of certiorari on July 25, 1988, a copy of which was received by Respondents on July 28, 1988.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

A. Certiorari Should Be Denied Because Petitioner Has Not Shown That This Case Meets the Demanding Standards of Supreme Court Rule 17

Petitioner has not even attempted to adduce any of the "special and important reasons" which the Court has prescribed as prerequisites for the discretionary grant of review on writ of certiorari. Sup. Ct. R. 17.1 sets out three considerations governing review that are germane to the determination of Weyerhaeuser's petition; they indicate that the Court may grant discretionary review in the following circumstances:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another court of appeals in the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision.
>
> (c) When a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court . . . .

Sup. Ct. R. 17.1. Each of these considerations will be reviewed in turn.

1. All Three Federal Courts of Appeals That Have Ruled on the Issue Agree that Forestry Workers Are Engaged in Agricultural Employment for the Purposes of the Migrant and Seasonal Agricultural Worker Protection Act

Perhaps the most frequently invoked ground for the exercise of this Court's certiorari jurisdiction is the

need to resolve conflicts among the circuits on important issues of law. That reason certainly is not present where Petitioner requests that the Court review a question on which all three circuits that have addressed the issue are in unanimous agreement. Applying the same canons of interstitial statutory interpretation and viewing the legislative history in the same light, the Fifth, Ninth and Eleventh Circuits have all concluded that migrant workers employed in forestry work are covered by the protections of AWPA. First the Eleventh Circuit decided that forestry crewleaders were engaged in agricultural labor under the provisions of the Farm Labor Contractor Registration Act, 7 U.S.C. § 2042(d) (1974), the statutory predecessor to AWPA, in *Davis Forestry Corp. v. Smith*, 707 F.2d 1325, 1328 n.3 (11th Cir. 1983); then the Ninth Circuit, in a case involving the United States Forest Service, the United States Department of Labor, and forestry crewleaders held that for the purposes of AWPA, the term "agricultural employment" encompasses forestry operations. *Bresgal v. Brock*, 833 F.2d 763 (9th Cir. 1987), *modified*, 843 F.2d 1163 (9th Cir. 1988).

Most recently, in a unanimous opinion, the Fifth Circuit joined the other two circuits in reaching the same conclusion in this case. *Bracamontes v. The Weyerhaeuser Co.*, 840 F.2d 271 (5th Cir.), *reh'g denied*, 845 F.2d 1022 (5th Cir. 1988). No other courts of appeal have considered the question.

Weyerhaeuser admits that there is uniformity of agreement among the circuits on the coverage issue. Instead it merely—and in the context of this Court's certiorari jurisdiction, irrelevantly—claims that all three circuits decided the question erroneously. The

workers, who allege that they were recruited by contractors in violation of the Act, were transported in an unsafe, uninsured vehicle, and were housed in an uninspected, unheated house in freezing weather, believe that the decision below properly interpreted the intent of Congress to extend the protections the Act to migrants who plant trees, regardless of whether the trees were of the timber or the fruit variety.

2. No Claim Has Been Made That the Court of Appeals Has Departed From the Accepted and Usual Course of Judicial Proceedings so as to Require the Exercise of the Court's Power of Supervision

Weyerhaeuser has not suggested that the decision of the Fifth Circuit is such a radical departure from the "accepted and usual course of judicial proceedings" as to justify this Court's exercise of its supervisory powers over the lower courts. The Company's primary argument is that the Court of Appeal usurped the legislative function in attempting to divine the intent of Congress with respect to coverage under the Act. Plaintiffs disagree, of course. But more important to the exercise of the Court's certiorari jurisdiction is the question of whether the Fifth Circuit ventured beyond the pale of traditional statutory interpretation.

In its quest for Congressional intent the circuit court looked first to the language of the statute,[1] then to the legislative history of the 1974 amendments to

[1] "The term 'agricultural employment' means employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 203(f)), or section 312(g) of Title 26 and the . . . planting . . . of any agricultural or horticultural commodity in its unmanufactured state." 29 U.S.C. § 1802(3).

the predecessor statute.[2] The court examined the remedial purposes of the Act, gave appropriate deference to the administrative interpretation of the Act by the Department of Labor, and reviewed the decisions of the other two circuit courts that had contemplated the same issue. Weyerhaeuser complains only of the result achieved, not of the process followed. The Fifth Circuit properly exercised its traditional judicial function in determining the intent of Congress.

3. Whether Forestry Workers are Engaged in Agricultural Employment for the Purposes of AWPA Does Not Constitute "an Important Question of Federal Law Which . . . Should be Settled by this Court"

To be sure, to the migrant farm workers who plant trees for Weyerhaeuser and other timber companies the question as to whether they are protected by AWPA is of great significance. The importance of an issue to the litigants is not, however, an appropriate criterion by which the certiorari jurisdiction of this Court is invoked. Rather, that criterion is whether the issue falls within the scope of the nationally significant jurisprudence that it is the exclusive function of the Supreme Court to shape. Manifestly, a question of statutory interpretation affecting only a minuscule sector of the labor force—especially where it has been identically resolved by three courts of appeal—cannot press a serious claim on the discretionary docket of this Court.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari to review the decision of the United States

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[2] Farm Labor Contractor Registration Act of 1963, 7 U.S.C. §§ 2042-2058 (repealed 1983).

Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

David G. Hall
Marc Linder
TEXAS RURAL LEGAL AID, INC.
259 S. Texas Blvd.
Weslaco, TX 78596

Counsel for Respondents

Supreme Court, U.S.
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88-164

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE WEYERHAEUSER COMPANY, Petitioner

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Myron Timothy Boe
Jim Hunter Birch
Rose Law Firm
A Professional Association
120 East Fourth Street
Little Rock, AR 72201
(501) 375-9131

ATTORNEYS FOR PETITIONER

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RUBEN BRACAMONTES, ET AL.,
Appellants

VS. NO. 87-2456

THE WEYERHAEUSER COMPANY, ET AL.,
Appellees

DATE ENTERED March 22, 1988
Appeal from the United States District Court
for the Southern District of Texas

BEFORE TIMBERS,* KING AND
HIGGINBOTHAM, CIRCUIT JUDGES.

PATRICK E. HIGGINBOTHAM, CIRCUIT JUDGE:

Appellants are migrant workers whom appellees employed to plant pine seedlings in Alabama. They filed suit under the Migrant and Seasonal Agricultural Worker Protection Act. The district court dismissed the suit because the MSPA did not apply to those performing forestry work exclusively. We reverse, finding that Congress intended the Act to apply to farm labor contractors who hire migrant workers for employment in the farming of trees.

I.

Weyerhaeuser hired labor contractors to recruit migrant workers to plant pine seedlings on land owned by Weyerhaeuser in Alabama. The contractors recruited Ruben Bracamontes, Reyes Perez, and Pablo Martinez, Mexican-American migrant agricultural workers from the Rio Grande Valley of Texas, and employed Sendejo to transport the workers to Alabama.

The workers filed this suit on February 27, 1987, alleging

violations of the Migrant and Seasonal Agricultural Worker Protection Act,[1] including its provisions for labor contractor registration, disclosure, transportation, housing, and confirmation of registration. The workers asked the district court to enjoin Weyerhaeuser from using farm labor contractors until the company determined that the contractors were registered with the Department of Labor.

The district court granted a motion to dismiss, ruling that the case was factually indistinguishable from Aguirre v. Davis Forestry Corp.,[2] in which the court decided that MSPA's predecessor statute, the Farm Labor Contractor Registration Act, did not apply to parties engaged exclusively in forestry activities.[3]

II

Congress in 1963 began regulating contractors who supplied migrant agricultural laborers. The Farm Labor Contractor Registration Act defined "migrant worker" as "an individual whose primary employment is in agriculture. . . ."[4] The FLCRA in turn defined agriculture by reference to § 203 of the Fair Labor Standards Act[5] and § 3121(g) of the Internal Revenue Code.[6] Both of these sections require that the work be performed on a traditional farm; neither section has been interpreted to include forestry work.[7]

Congress amended FLCRA in 1974. In defining "agricultural employment" Congress retained the references to § 203(f) and § 3121(g) but added a third definition — agricultural employment including "the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of an agricultural or horticultural commodity in its unmanufactured state."[8] The MSPA retained this provision in § 1802(3) when MSPA replaced FLCRA in 1984.[9]

The dispute is over the scope of this third definition. Bracamontes contends that the phrase "agricultural or horticultural commodity" expands MSPA's coverage to include the planing of pine seedlings and that legislative history demonstrates that Congress intended to protect migrant agricultural workers who plant trees. Weyerhaeuser argues that Bracamontes was not engaged in "agricultural employment" within the meaning of the Act and thus cannot be a "migrant agricultural worker" as the Act defines such a worker in § 1802(8).[10] Because the Act's legislative history indicates

that Congress intended the Act to cover migrants who work on tree farms, we agree with Bracamontes that the third definition in § 1802(3) includes the planting of pine seedlings. The question is a close one and either of the interpretations urged are plausible.

III.

We first examine the statute's language, of course. The handling or planting of an "agricultural or horticultural commodity" could be construed in ordinary usage to include the planting of pine seedlings, as well as other forestry labor.[11] We have recognized that agriculture describes a broad activity and that many dictionaries include forestry within the definition of agriculture.[12] The Department of Labor also has recognized that " 'agriculture' is sometimes used in a broad sense as including the science and art of cultivating forests. . . ."[13]

> The legislative history of the 1974 amendments to FLCRA also indicates that the Act encompasses farm labor contractors in the forestry business. The Senate Report directly addresses such coverage:
>
> The Committee has been informed by the Commissioner of the Immigration and Naturalization Service that some government agencies have permitted the employment of illegal aliens as tree planters, thinners and other forest laborers by awarding contracts to forestry contractors who regularly employ aliens who have illegally entered the United States. The provision of this bill and its penalties are intended to apply to such contractors.[14]

Bracamontes also points us to the House debates on the Immigration Reform and Control Act of 1986, in which Congressman Weaver stated, "While forestry is sometimes included in the definition of agriculture, this has been done only in broadly remedial statutes like the Migrant and Seasonal Agricultural Worker Protection Act."[15]

Both the Ninth and Eleventh Circuits have decided that Congress specifically intended that the Act cover farm labor

contractors in the forestry business.[16] "There is little doubt that the 1974 Amendments were intended to apply to forestry contractors who employ 'tree planters, thinners and other forest laborers.'" [17]

Weyerhaeuser argues that this passage in Davis is dictum because the real issue in Davis was the standing under the FLCRA of a competitor of a farm labor contractor to challenge the contractor's noncompliance with the FLCRA. However, as the Bresgal district court noted, the Eleventh Circuit would not have engaged in a lengthy analysis of standing doctrine if it had been convinced that the FLCRA did not cover forestry.[18] Moreover, contrary to Weyerhaeuser's assertion that Davis did not review the legislative history, the Eleventh Circuit relied on the Senate Report of the 1974 amendments.

Interpreting the Act to cover contractors who hire migrants for forestry work also is consistent with one of the Act's purposes, which is to prevent contractor exploitation of migrant and seasonal laborers, particularly aliens.[19] Congress described contractor abuse of migrant labor:

> It is unfortunately an all too common experience for workers to be abused by farm labor contractors. Testimony revealed that in many cases the contractor: exaggerates conditions of employment when he recruits workers in their home base, or that he fails to inform them of their working conditions at all; transports them in unsafe vehicles; fails to furnish promised housing, or else furnishes substandard and unsanitary housing; operates a company store while making unitemized deductions from workers' paychecks for purchases, and pays the workers in cash without records of units worked or taxes withheld.[20]

Forestry laborers are susceptible to similar abuses.[21] Thus, the Ninth Circuit concluded that " '[i]t is inconceivable that Congress intended to protect workers planting fruit trees in an orchard, and to disregard workers planting fir trees on a hillside, when both groups suffer from the same clearly identified harm.'" [22]

Weyerhaeuser argues that the 1974 amendments broadened the Act's coverage in only two ways; it expanded coverage to intrastate, as well as interstate, commerce, and also added "coverage for employment involving the processing of agricultural commodities in an unmanufactured state."[23] Weyerhaeuser thus contends that coverage was expanded vertically to all steps in the production chain of products previously covered by the FLSA and IRC definitions,[24] but not horizontally, to growing operations not previously covered, such as forestry.

Weyerhaeuser also attacks any reliance on the Senate Report's statement about forestry. Weyerhaeuser stresses that the statement should be limited to its context, discussing illegal aliens. But the context is not here so confining. Congress found that illegal aliens comprised a large source of the country's agricultural labor[25] and wanted to Act to cover contractors who hired any migrant labor, not only illegal aliens, for forestry operations.

The vertical expansion of the act is plain, but it is not plain that Congress intended more. The Ninth Circuit concluded that the "handling, planting, [or] drying" mentioned in the third prong all came within the FLSA definition of agriculture.[26] These phrases would be redundant had Congress not meant to deemphasize the activity's location. We also note the similarities between the third prong and § 3121(g)(4)(A) of the IRC. The descriptions of the activities are almost identical. The primary difference is that the third prong drops the restriction that the labor be performed "in the employ of an operator of a farm." We agree that this suggests an intended horizontal reach and did not simply expand coverage to processing-that Congress also intended the Act to cover activities even when not performed on a traditional farm.[27]

Weyerhaeuser argues, and the argument has considerable force, that we should defer to DOL's interpretation of the MSPA[28]-that forestry workers do not perform agricultural employment within the meaning of the Act, that the third definition, like the IRC and FLSA, excludes forestry. DOL has reasoned that Congress in defining "agricultural employment" intended to adopt the previous administrative construction of "agricultural or horticultural commodities," which excluded trees grown in forests and their lumber.[29]

DOL is due deference in its construction of the Act but even with deference, we are persuaded that Congress did not intend so narrow a reading. The FLSA traditionally has exempted those persons employed in agriculture from its remedial provisions concerning minimum wages and maximum hours.[30] The Supreme Court has declared that FLSA exemptions should be construed narrowly,[31] which DOL recognizes.[32] Relatedly, the MSPA is remedial in nature and must be read broadly.[33] The suggested narrow reading of § 203(f) to the MSPA would disserve the Act's remedial purpose.

Weyerhaeuser implies that such a reading creates an internal inconsistency because § 203(f) expressly limits forestry operations to those performed on a farm; reference to § 203(f) then becomes superfluous if the third prong does not in a parallel fashion exclude forestry. We disagree. As we previously have decided, those that do not fall within the FLSA and IRC prongs of § 1802(3) still may be encompassed in the third.[34] Moreover, Weyerhaeuser fails to illuminate any clash in policy if the third prong does not require the work to be performed on a traditional farm.

Finally, Weyerhaeuser offers a related argument that the exclusion of forestry workers is consistent with the general regulatory scheme established by Congress, including Title VII, § 1981, the Service Contract Act of 1965, the Immigration Reform and Control Act of 1986, and the National Labor Relations Act. This is so but the statutes address different evils. We see no unevenness in policy resulting from our reading of the MSPA.

V.

The MSPA applies to farm labor contractors who employ those migrant and seasonal agricultural workers engaged in agricultural employment as the Act defines it. Today we hold that Congress intended that agricultural employment include forestry operations even when not performed on a traditional farm. Thus appellants, who planted pine seedlings for Weyerhaeuser, are migrant workers as defined by the Act and consequently are entitled to its protection. In so holding, we acknowledge that the question is difficult. On balance, we are persuaded by the remedial purposes of the Act and the difficulties of migrant workers planting trees and

produce, and the explicit language of the Senate Report. Finally, we are reluctant to disagree with the two circuits who have considered the issue and create a conflict among circuits over an admittedly difficult task of locating congressional purpose.

REVERSED.

FOOTNOTES

* Circuit Judge of the Second Circuit, sitting by designation.

[1] 29 U.S.C. § 1801 et. seq.

[2] Civil Action No. B-81-142 (S.D. Tex. Mar. 13, 1987).

[3] Id.

[4] 7 U.S.C. § 2042(g) (repealed).

[5] (f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . ., the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. 29 U.S.C. § 203(f).

[6] (g) Agricultural labor.-For purposes of this chapter, the term "agricultural labor" includes all services performed - (1) on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife; (2) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

* * * *

(4)(A) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed; . . . As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. 26 U.S.C. § 3121.

[7] DOL specifically has stated that "[t]rees grown in forests and the lumber derived therefrom are not 'agricultural or horticultural commodities'" and thus forestry operations do not come within § 203(f) unless "performed by a farmer or on a farm as an incident to or in conjunction with his or its farming operations." 29 C.F.R. § 780.115 (1987).

[8] 7 U.S.C. § 2042(d) (repealed).

[9] (3) The term "agricultural employment" means employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), or section 3121(g) of Title 26 and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state. 29 U.S.C. § 1802(3).

[10] (8)(A) Except as provided in subparagraph (B), the term "migrant agricultural worker" means an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.

(B) The term "migrant agricultural worker" does not include - (i) any immediate family member of an agricultural employer or a farm labor contractor; or (ii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States

under sections 1101(a)(15)(H)(ii) and 1184(c) of Title 8. 29 U.S.C. § 1802(8).

[11] See Bresgal v. Brock, 637 F. Supp. 271, 273 (D.Or.1985), aff'd, 833 F.2d 763 (9th Cir. 1987).

[12] See United States v. Turner Turpentine Co.., 111 F.2d 400, 404-05 (5th Cir. 1940).

[13] 29 C.F.R. § 780.200 (1987). DOL in the same section limits coverage under § 203(f) to forestry operations performed on a traditional farm. Id.

[14] S. Rep. No. 1295, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 6441, 6444 (emphasis supplied).

[15] 132 Cong. Rec. H9870 (daily ed. Oct. 10, 1986).

[16] See Bresgal v. Brock, 833 F.2d at 766; Davis Forestry Corp v. Smith, 707 F.2d 1325, 1328 n. 3 (11th Cir. 1983).

[17] Davis, 707 F.2d at 1328 n. 3 (quoting the Senate Report).

[18] See Bresgal, 637 F. Supp. at 276.

[19] 1974 U.S. Code Cong. & Admin. News at 6441-45.

[20] Id. at 6442.

[21] Appellants allege that they were transported in a van without sufficient seats for all the workers, forcing some to lie on the floor or sit on baggage. They also allege that they first were housed in a dwelling that health officials had neither inspected nor certified for occupancy. They claim there was no heat or blankets even though the temperature was below freezing.

The Ninth Circuit also has found that "[t]he conditions that Congress addressed in the [MSPA], and the persons protected, are the same in the forestry industry as in more conventional agricultural

industries." Bresgal, 833 F.2d at 766.

[22] Bresgal, 833 F.2d at 766 (quoting Bresgal, 637 F. Supp. at 277); Cf. Almendarez v. Barrett-Fisher Co., 762 F.2d 1275, 1281 (5th Cir. 1985) ("The [packing shed operator] defendants identify no functional distinction between their activities vis-a-vis the plaintiffs and those of the middle men recognized as farm labor contractors before the 1974 amendment.")

[23] 1974 U.S. Code & Cong. News at 6446 (emphasis added).

[24] For example, the Act now would cover contractors who supply labor to the tomato cannery whereas before the 1974 amendments the Act only would encompass contractors who hired labor to pick the tomatoes. See Bresgal, 637 F. Supp. at 275.

[25] 1974 U.S. Code Cong. & Admin. News at 6444.

[26] In discussing nursery and landscaping operations, the Department of Labor recognizes that planting comes within § 203(f). 29 C.F.R. § 780.206(a)(1987).

[27] See Bresgal, 833 F.2d at 767.

[28] Almendarez, 762 F.2d at 1281 (stating that with regards to DOL's interpretation of the MSPA that "we are obliged to defer to reasonable interpretation of a statute by an agency charged with its administration").

[29] See Bresgal, 637 F. Supp. at 275. The Ninth Circuit noted that DOL never had construed the amended § 1802(3) until the advent of the Bresgal litigation. See Bresgal, 833 F.2d at 768.

[30] See 29 U.S.C. § 213(a)(6). This exemption, however, has been significantly changed. See 29 U.S.C.A. § 213(a)(6) (Supp. 1986).

[31] See Phillips Co. v. Walling, 324 U.S. 490, 493, 65 S. Ct. 807, 808, 89 L.Ed. 1095 (1945).

[32] See 29 C.F.R. § 780.2 (1987).

[33] See Soliz v. Plunkett, 615 F.2d 272, 275 (5th Cir. 1980); see also Montelongo v. Meese, 803 F.2d 1341, 1346 n. 15 (5th Cir. 1986) (same), cert. denied, - U.S. -, 107 S. Ct. 2179, 95 L.Ed.2d 835 (1987); Almendarez, 762 F2d at 1281 (same).

[34] See Almendarez, 762 F.2d at 1280 (finding that Congress intended to extend FLCRA to packing shed operators as farm labor contractors even though such operators did not fall literally within IRC and FLSA definitions of "agricultural employment").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

BROWNSVILLE DIVISION

RUBEN BROCAMONTES, REYES PEREZ,
and PABLO MARTINEZ, and all
others similarly situated

VS. NO. B-87-029

THE WEYERHAEUSER COMPANY,
MARIO RODRIGUEZ, GUADALUPE
RODRIGUEZ, ISABEL RODRIGUEZ,
individually and d/b/a
SOUTH TEX REFORESTERS, and
JUAN SENDEJO

Entered: April 15, 1987

ORDER

On this day came to be heard the Motion to Dismiss of Defendants, Mario Rodriguez, et al., and the Motion to Dismiss of Defendant Weyerhaeuser Company. The Court has reviewed the briefs and submissions of the parties and, after analyzing testimony at the hearing held on March 25, 1987, believes that the Motions are meritorious and should be granted. The Court is of the opinion that this case is not factually distinguishable from Civil Action No. B-81-142, Aguirre v. Davis Forestry Corp. and the Court will adhere to the ruling in that case. It is therefore ORDERED, ADJUDGED and DECREED that Plaintiff's Complaint against all Defendants is hereby DISMISSED.

DONE at Brownsville, Texas this 15th day of April, 1987.

s/ FILEMON B. VELA
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RUBEN BROCAMONTES, ET AL.,
Plaintiffs-Appellants

VS. NO. 8-87-2456

THE WEYERHAEUSER COMPANY, ET AL.,
Defendants-Appellees

Appeal from the United States District Court for the
Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 3/22/88, 5 Cir., 19_, _ F.2d _)
(April 25, 1988)

Before TIMBERS,* KING AND HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Patrick Higginbotham
United States Circuit Judge

*Circuit Judge of the Second Circuit, sitting by designation.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

BROWNSVILLE DIVISION

RUBEN BRACAMONTES, REYES PERES, and PABLO MARTINEZ, and all others similarly situated,	§	
Plaintiffs,	§	
v.	§	C.A. NO. B-87-029
THE WEYERHAEUSER COMPANY, MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ, ISABEL RODRIGUEZ individually and d/b/a SOUTH TEX REFORESTERS, and JUAN SENDEJO,	§	PLAINTIFFS' ORIGINAL COMPLAINT FOR DAMAGES AND DECLARATORY AND INJUNCTIVE RELIEF
Defendants.	§	

Filed February 27, 1987

PRELIMINARY STATEMENT

1. Plaintiffs, Mexican-American migrant agricultural workers, bring this action for injuries they suffered when Defendants THE WEYERHAEUSER COMPANY (hereinafter "WEYERHAEUSER"), MARIO RODRIGUEZ, GUADALUPE

RODRIGUEZ, and ISABEL RODRIGUEZ, individually and d/b/a SOUTH TEX REFORESTERS (hereinafter "STR"), and JUAN SENDEJO (Hereinafter "SENDEJO"), violated the registration, disclosure, transportation and housing provisions of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. §§ 1801 et seq.

2. Defendant WEYERHAEUSER, like the other large integrated timber companies operating in the South, has sought in recent years to increase its profits by "contracting out" woodlands work to labor recruiters and supervisors, such as Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ, AND ISABEL RODRIGUEZ, who can get such work done more cheaply by employing Mexican-American and Mexican migrant agricultural workers without complying with applicable Federal protective labor laws. In this context Defendant WEYERHAEUSER has, unlike some other forestry companies, sought to evade its own statutorily imposed responsibilities, by refusing to comply with its non-employer-related confirmation of registration obligation under AWPA.

3. Being desperately dependent on forestry work to provide their future subsistence, Plaintiffs ask the Court for immediate relief to protect them against violations of AWPA in the 1987 planting and weeding seasons. In order to protect themselves against irreparable injury, Plaintiffs seek an expedited hearing before this Court as soon as practicable and the issuance by this Court of a preliminary and a permanent injunction to enjoin: Defendant WEYERHAEUSER from utilizing the services of any and all farm labor contractors to supply Plaintiffs unless and until it takes reasonable steps to determine that said persons are registered and authorized to engage in the farm labor contractor activities for which Defendant WEYERHAEUSER utilizes them; and to enjoin Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ individually and d/b/a STR from recruiting, transporting, driving or housing Plaintiffs unless and until they are registered and authorized to engage in those activities. Plaintiffs seek as well liquidated damages for the past violations of AWPA.

JURISDICTION

4. This Court has jurisdiction pursuant to 29 U.S.C. § 1854(a) (AWPA); 28 U.S.C. § 1331 (Federal Question); and 28 U.S.C. § 1337 (Interstate Commerce). Declaratory relief is authorized by 28 U.S.C. § 2201 and § 2202.

PLAINTIFFS

5. Plaintiffs RUBEN BRACAMONTES (hereinafter "BRACAMONTES"), REYES PEREZ (hereinafter "PEREZ"), and PABLO MARTINEZ (hereinafter "MARTINEZ") are migrant agricultural workers residing in Hidalgo County, Texas, who perform both farm and non-farm agricultural work. Plaintiffs were recruited in December, 1986 by Defendant SENDEJO, who was acting as the agent of Defendant WEYERHAEUSER and of Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ, and ISABEL RODRIGUEZ, individually and d/b/a STR, to plant pine trees for Defendant WEYERHAEUSER and Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ, individually and d/b/a STR in Alabama, and were in fact so employed by said Defendants. At all times relevant to this action Plaintiffs were migrant agricultural workers within the meaning of 29 U.S.C. § 1802 (8) (A), and employees of Defendant WEYERHAEUSER and Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ, and ISABEL RODRIGUEZ, individually and d/b/a STR, within the meaning of 29 U.S.C. § 203(e)(1) (Fair Labor Standards Act [FLSA]).

DEFENDANTS

6. Defendant WEYERHAEUSER, a multi-billion dollar corporation, is one of the largest forestry companies in the world. Owning in excess of 3,000,000 acres of forest land in the South, it is the only major forest products producer in the United States with a net self-sufficiency of raw materials from its own forest land. Defendant WEYERHAEUSER is incorporated in the State of

Washington, maintains its corporate headquarters in Tacoma, Washington, and owns and operates significant and numerous production facilities in Texas, where it is qualified by the Secretary of State to do business.

7. At all times relevant to this action Defendant WEYERHAEUSER was an agricultural employer within the meaning of 29 U.S.C. § 1802(2). Defendant WEYERHAEUSER employed Plaintiffs on its land in Alabama to plant pine seedlings, using Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ, and ISABEL RODRIGUEZ d/b/a STR to recruit, transport, house and supervise them. At all times relevant to this action Defendant WEYERHAEUSER was an employer-enterprise engaged in the production of goods for commerce within the meaning of 29 U.S.C. § 203.

8. Defendant WEYERHAEUSER has used Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ, and ISABEL RODRIGUEZ to recruit migrant agricultural workers for at least the last three years, during which time it has been continuously on notice of the latter's and it's own violations of AWPA.

9. Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ, and ISABEL RODRIGUEZ do business as STR in Caledonia, Mississippi. On Plaintiffs' best information and belief all three travel frequently to Texas to recruit workers, and own property (including a residence) in Pharr, Texas. Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ, and ISABEL RODRIGUEZ d/b/a STR were at all times relevant to this action employed by Defendant WEYERHAEUSER to recruit, transport, house and supervise Plaintiffs and did in fact recruit, transport, house, and supervise Plaintiffs; as such employees of an agricultural employer, Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ, and ISABEL RODRIGUEZ, individually and d/b/a STR were subject to the information, record keeping, transportation and housing requirements of AWPA (although exempt from the registration requirements of AWPA). In the alternative, Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ, and ISABEL RODRIGUEZ d/b/a STR were at all times relevant to this action farm labor contractors within the meaning of 29 U.S.C. § 1802(7), although they were not registered to perform the aforementioned farm labor contracting activities pursuant to 29 U.S.C. § 1811(a).

Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ, and ISABEL RODRIGUEZ d/b/a STR, acting as the agent of Defendant WEYERHAEUSER, employed Defendant SENDEJO to recruit Plaintiffs in, and transport them from, Texas to Alabama. At all times relevant to this suit Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ, and ISABEL RODRIGUEZ, individually and d/b/a STR were employers within the meaning of 29 U.S.C.§ 203. On Plaintiffs' best information and belief, Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ reside in Hidalgo County, Texas.

10. Defendant SENDEJO was at all times relevant to this action a farm labor contractor within the meaning of 29 U.S.C. § 1802(7). Although not registered with or authorized by the United States Department of Labor to engage in any farm labor contracting activities, Defendant SENDEJO, acting as the agent of Defendants WEYERHAEUSER and MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ, individually and d/b/a STR, recruited Plaintiffs in Texas and drove them to Alabama. Defendant SENDEJO resides in Hidalgo County, Texas.

CLASS ACTION

Class A: Rule 23(b)(2) Class (Injunctive Relief under AWPA)

11. Plaintiffs bring this action on their own behalf and on behalf of all migrant agricultural workers who have been, are now being or will be recruited in South Texas by Defendants to plant pine seedlings or perform other forestry practices for Defendants.

Class B: Rule 23(b)(3) Subclass (Damages under AWPA)

12. Plaintiffs also bring this action on behalf of all persons within Class A supra who have within the past three years been or are currently being recruited and employed by any of the Defendants to plant seedlings or perform other forestry practices.

13. With respect to each of the above classes: the members are so numerous that joinder is impracticable; there are questions of law or fact common to the classes, the claims of the representative parties are typical of the claims of the classes; and the representative parties will fairly and adequately protect the interests of the classes.

14. With respect to Class A, Defendants have acted or

refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

15. With respect to Class B, the questions of law or fact common to the Class predominate over any questions affecting only individual members, and a Class action is superior to other available methods for the fair and efficient adjudication of the controversy.

FACTS

16. The U.S. forestry industry is in the grip of an historic transformation associated with the shift of focus from the Northwest to the South. The massive acquisition of forest land in the South has been motivated by three factors: the significantly shorter growing cycle of the southern loblolly pine compared to that of the mainstay of the northwestern forestry industry, the Douglas fir; the considerably lower wage level and degree of union organization in the South; and the predominance of small private forest land ownership in the South, which translates into fewer environmental restrictions than is the case in the Northwest, where concentrated Federal ownership of forest land has traditionally meant more restrictive environmental policies.

17. Defendant WEYERHAEUSER has been at the forefront of this revolution, now owning more forest land in the South than in its northwestern home base.

18. In connection with their efforts to take advantage of the most advanced scientific techniques of reforestation, especially on the roughest terrain, least accessible to mechanized forestry practices, the large timber companies in the South have had to face the problem of securing an adequate work force for the very labor-intensive practice of hand-planting pine seedlings (and, secondarily, of injecting trees for the purpose of weeding).

19. Even as recently as a few years ago many companies performed the bulk of this work with payroll crews consisting of seasonal employees recruited locally and paid on an hourly basis. The timber companies' refusal to pay these workers more than the minimum wage created the appearance of the exhaustion of local labor reserves. At the same time the companies were eager to shed

these payroll employees for fear that incipient attempts by labor unions to widen the scope of their collective bargaining units from pulp mills and permanent year-round woodlands employees to such seasonal employees might ultimately be successful. Finally, becoming subject to increased foreign, especially Canadian, competition, the forestry companies began casting about for cost-cutting innovations.

20. Prominent among these practices has been the fictitious "contracting out" of hand-planting (and injecting) work to former hand-planters who had saved enough money to buy a truck or van in which they could transport other hand-planters. Such "contractors" chief function and sole competitive advantage consisted and continues to consist in their ability to recruit desperately poor and hence vulnerable Mexican-American and Mexican migrant agricultural workers, whom they could subject to unlawful exploitation.

21. Such exploitation has taken the form of not paying: a. the minimum wage; b. overtime; c. travel time; d. Federal Insurance Contributions Act, Federal Unemployment Tax Act or Workers Compensation taxes; e. contractually stipulated piece-rates; or f. for all the acres actually planted or injected.

22. By engaging in these unlawful practices, such labor agents have been able to reduce the timber companies' planting costs, which consist almost entirely of wages, to the point at which larger, reputable forestry contractors, employing as many as five hundred, more experienced hand-planters, can no longer compete with such labor agents for work with timber companies.

23. Defendant WEYERHAEUSER has been on the cutting edge of such illegal cost-cutting practices. by systematically cultivating "contractors" whose livelihood crucially hinges on such practices, Defendant WEYERHAEUSER has virtually excluded reputable contractors from working for it.

24. Chief among these so-called contractors are Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ d/b/a STR. These Defendants—one-time registered crew leaders for the purpose of recruiting migrant farm workers on behalf of farmers—are themselves merely hand-planters who, capitalizing on their familarity with the farm labor recruiting scene in the Rio Grande Valley and pooling their savings from their farm labor contracting activity, were able to get in on the ground floor with Defendant WEYERHAEUSER under its new regime of "outside

contracting."

25. Especially since the unprecedented freeze of December 1983 destroyed the citrus industry and therewith the main source of winter agricultural employment in the Rio Grande Valley, unemployed farm workers have become subjected to and increasingly reliant on recruitment for winter planting work in the other southern states.

26. During these past three years Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ d/b/a STR, taking advantage of these workers' desperate economic plight, have become a mainstay of Defendant WEYERHAEUSER's hand-planting operations in the Mississippi-Alabama border area.

27. As a result of massive violations of AWPA and FLSA in 1984, several crews of migrant agricultural workers filed suit in 1985 against Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ d/b/a STR in this Court in connection with work performed for Defendant WEYERHAEUSER.

28. The plaintiffs in that case entered into a monetary settlement with Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ d/b/a STR. These Defendants at that time undertook to register as farm labor contractors and otherwise to act in conformity with AWPA.

29. Although Defendant WEYERHAEUSER has been continuously on notice since that time of on-going violations involving Defendant STR, Defendant WEYERHAEUSER has repeatedly refused to acknowledge its responsibilities under 29 U.S.C. § 1842.

30. In December 1986 Defendant SENDEJO, acting as the agent of the remaining Defendants, recruited Plaintiffs at the International Bridge at Hidalgo, Texas, the central location for recruitment of migrant and seasonal agricultural workers in the Rio Grande Valley.

31. At the time of recruitment Defendants failed to furnish Plaintiffs with any written disclosures of any of the terms or conditions of their employment.

32. Orally Defendant SENDEJO, acting as the agent of the remaining Defendants, merely informed Plaintiffs that they were being hired to plant pine seedlings for the remaining Defendants for

five weeks in Alabama. Defendants did not even inform Plaintiffs of the wage they would be paid.

33. Defendant SENDEJO was not at any time relevant to this action registered with the U.S. Department of Labor as a farm labor contractor or authorized to drive, transport or house migrant agricultural workers.

34. Defendant SENDEJO drove and Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ d/b/a STR transported Plaintiffs together with eight other workers in a van owned by the latter Defendants. The vehicle was so crowded that some workers had no seats and had to sit on their baggage.

35. The vehicle was not properly insured.

36. Upon Plaintiffs' arrival in Alabama Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ d/b/a STR housed Plaintiffs in a house which said Defendants owned. This house had not been inspected or certified for occupancy by State of local health officials. Despite the fact that the temperature was below freezing and ice was still visible in mid-morning, the house was not heated and Plaintiffs were not furnished with blankets. Said Defendants did not post a statement of the terms and conditions of occupancy of said housing.

37. Defendant WEYERHAEUSER utilized the services of Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ d/b/a STR to supply Plaintiff-migrant agricultural workers without first taking reasonable steps to determine whether said Defendants possessed a valid certificate of registration from the U.S. Department of Labor authorizing them to drive, transport and house Plaintiffs.

38. Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ d/b/a STR did not post at Plaintiffs' place of employment a poster provided by the Secretary of Labor setting forth the rights and protection afforded plaintiffs under AWPA.

39. Defendant ISABEL RODRIGUEZ individually and d/b/a STR warned Plaintiffs not to seek legal redress upon their return to Texas.

FIRST CAUSE OF ACTION

(AWPA DAMAGES)

40. Defendant WEYERHAEUSER has intentionally violated the rights of Plaintiffs and of Class B protected under AWPA by utilizing the services of farm labor contractors to recruit Plaintiffs without first taking reasonable steps to determine that such farm labor contractors possessed valid certificates of registration, in violation of 29 U.S.C. § 1842.

41. Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ d/b/a STR have intentionally violated the rights of Plaintiffs and Class B protected under AWPA by:

a. engaging in farm labor contracting activities without having a certificate of registration from the Secretary of Labor authorizing them to engage in those activities, in violation of 29 U.S.C. § 1811(a);

b. hiring, employing or using Defendant SENDEJO to drive Plaintiffs although Defendant SENDEJO did not have a certificate of registration from the Secretary of Labor, in violation of 29 U.S.C. § 1811(b);

c. failing to file with the Secretary of Labor a statement identifying each vehicle to be used to transport Plaintiffs or documentation showing that said Defendants were in compliance with the requirements of 29 U.S.C. § 1841 with respect to each such vehicle, in violation of 29 U.S.C. § 1812(2);

d. failing to file with the Secretary of Labor a statement identifying the facility to be used to house Plaintiffs or documentation showing that said Defendants were in compliance with 29 U.S.C. § 1823 with respect to such facility, in violation of 29 U.S.C. § 1812(3);

e. failing to file with the Secretary a sworn and subscribed declaration consenting to the designation by a court of the Secretary of Labor as agent for service in any action against said Defendants if the latter leave the jurisdiction in which the action is commenced, in violation of 29 U.S.C. § 1812(5);

f. failing to disclose Plaintiffs in writing at the time of recruitment any of the terms and conditions of employment, in violation of 29 U.S.C. § 1812(a)(1)-(7);

g. failing to place at the place of employment a poster

provided by the Secretary of Labor setting forth Plaintiffs' rights and protections under AWPA, in violation of 29 U.S.C. § 1812(b);

h. failing to post or present to Plaintiffs a statement of the terms and conditions of occupancy of the housing they provided Plaintiffs, in violation of 29 U.S.C. § 1821(c);

i. failing to disclose the information required to be disclosed by 29 U.S.C. § 1821(a)-(c) in writing and in Spanish, in violation of 29 U.S.C. § 1821(g);

j. failing to ensure that housing owned or controlled by said Defendants which was used to house Plaintiffs complied with applicable substantive Federal and State health and safety standards, in violation of 29 U.S.C. § 1823(a);

k. permitting a facility owned or controlled by said Defendants to be occupied by Plaintiffs without having secured a certificate from a State or local health authority certifying that the facility met applicable safety and health standards and without posting said certificate, in violation of 29 U.S.C. § 1823(b)(1);

l. failing to ensure that the vehicle(s) that said Defendants used or caused to be used to transport Plaintiffs conformed to applicable Federal and State safety standards, in violation of 29 U.S.C. § 1841(b)(1)(A) (incorporating by reference 49 C.F.R. Part 398);

m. failing to have in effect an insurance policy that insured said Defendants against liability for damage arising from the ownership, operation, or the causing to be operated, of the vehicle(s) used to transport Plaintiffs, and that reached the level of insurance required by Federal law, in violation of 29 U.S.C. §§ 1841(b)(1)(C) and 1841(b)(3); and

n. intimidating, threatening and discriminating against Plaintiffs because of the exercise, with just cause, by Plaintiffs of rights or protection afforded by AWPA, in violation of 29 U.S.C. § 1855(a).

42. Defendant SENDEJO intentionally violated Plaintiffs' rights protected under AWPA by intentionally engaging in farm labor contractor activities, to wit recruiting and driving, without obtaining a certificate of registration from the Secretary of Labor authorizing him to engage in those activities.

SECOND CAUSE OF ACTION
(AWPA INJUNCTIVE RELIEF)

43. The failure of Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ d/b/a STR and of Defendant SENDEJO to register with the Secretary of Labor and to secure authorization to engage in the farm labor contracting activities of transporting, driving and housing, as well as the failure of Defendant WEYERHAEUSER to take reasonable steps to determine whether said Defendants are so registered and authorized constitute a continuing pattern of conduct. Plaintiffs and Class A have suffered, are suffering and will continue to suffer substantial and irreparable harm from these practices, and Plaintiffs have no adequate remedy at law.

44. Defendants' failure to comply with the registration requirements of AWPA has facilitated and continues to facilitate Defendants' substantive violations of the housing and transportation provisions of AWPA. Defendants' continuing failure to provide oral or written disclosures at the time of recruitment deprives Plaintiffs of: a. the information they need in order to make a rational decision about whether to accept such offers of employment by comparing them with other offers; and b. the documentary evidence needed to demonstrate Defendants' non-compliance with the substantive terms of employment.

45. Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ d/b/a STR were Defendants in a recent suit before this Court alleging virtually identical violations of Federal labor law. Nevertheless, these Defendants continue to violate AWPA.

46. Defendant WEYERHAEUSER has been on continuous notice since 1984 of its own and the other Defendants' violations of AWPA and FLSA. Nevertheless, Defendant WEYERHAEUSER continues to commit and profit from these violations.

47. Plaintiffs and Class A request immediate declaratory and injunctive relief restraining: a. Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ d/b/a STR from driving, transporting, or housing Plaintiffs or Class A members unless they have previously registered with and been authorized by the Secretary of Labor to engage in these farm labor contracting activities; and b. Defendant

WEYERHAEUSER from utilizing the services of farm labor contractors to supply Plaintiffs or Class A unless it takes reasonable steps to determine that such farm labor contractors possess a valid certificate of registration authorizing the activities for which the contractors are utilized.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and the Classes they represent pray that this Court:

1. Certify that this action may be brought as a class action pursuant to Rule 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of the Class and Subclass described in ¶¶ 11 and 12 of this Complaint;

2. Declare that Defendants' actions in failing to comply with the registration requirement of AWPA are unlawful;

3. Conduct an expedited hearing on the issues bearing on the request for a preliminary injunction;

4. Enter preliminary and permanent injunctions restraining:

a. Defendant WEYERHAEUSER from utilizing the services of any farm labor contractors to supply Plaintiffs or members of Class A unless Defendants WEYERHAEUSER first takes reasonable steps to determine that such contractors possess a certificate of registration issued by the Secretary of Labor which is valid and authorizes the activity for which Defendant WEYERHAEUSER utilizes them; and

b. Defendants MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ and ISABEL RODRIGUEZ d/b/a STR from engaging in any farm labor contracting activity related to Plaintiffs or Class A unless they have a certificate of registration from the Secretary of Labor specifying which farm labor contracting activities they are authorized to perform.

5. Enter judgment that Defendants violated provisions of AWPA as specified in ¶¶ 40-42 supra and award each Plaintiff and

each member of Class B liquidated damages in the amount of $500 for each violation of AWPA as specified in ¶¶ 40-42 supra; and

6. Award Plaintiffs such other relief as this Court deems just and proper.

Respectfully submitted

TEXAS RURAL LEGAL AID, INC.
259 S. Texas
Weslaco, TX 78596
(512) 968-9574

By:
s/ Marc Linder

Dated: February 27, 1987

APPENDIX E

U. S. DEPARTMENT OF LABOR
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

February 24, 1987

Mr. Isabel Rodriguez
South-Tex Reforesters
P. O. Box 155
Highway 12
Caledonia, Mississippi 39740

Dear Mr. Rodriguez:

This is in response to your recent letter requesting an opinion as to whether you and other associates of South-Tex Reforesters who employ workers to perform various reforestation and forestry operations are subject to the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). You ask if you and other associates must register with the Department of Labor (the Department) as farm labor contractors.

It is the position of the Department that forestry and reforestation workers are not engaged in agricultural employment within the meaning of MSPA, and are therefore not covered by the Act. In view of this position, you and your associates who employ workers to engage in the forestry operations named in your letter would not be subject to the registration requirement of MSPA.

The Department's position has been challenged in a suit filed in the United States District Court for the District of Oregon (Bresgal et. al. v. Brock, Civil Action No. 84-6351-E). In June of 1986, the District Court issued a judgment ordering the Department to expand its enforcement of MSPA to cover forestry work. The Department, in turn, filed an appeal of the district court's decision, and sought a stay pending appeal in the United States Court of Appeals, Ninth Circuit. On August 28, 1986, the Ninth Circuit Court of Appeals granted the Department's motion to stay the district court's judgment pending appeal. No decision has yet been rendered by the Court of

Appeals. After the Department has received and reviewed the court's decision an appropriate course of action will be determined.

If we can be of additional assistance, please do not hesitate to let me know.

Sincerely,

s/ Paula V. Smith
Administrator

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Entered March 19, 1984

RAFAEL C. AGUIRRE, RAFAEL E. AGUIRRE, JUAN MARTINEZ GARZA TIBURCIO PALOMO, JAIME PALOMO and FERMIN PALOMO	§	
VS.	C.A. NO.	B-81-142
DAVIS FORESTRY, INC., JERRY T. DAVIS and JUAN SALDANA	§	

MEMORANDUM

The focus of this Court's inquiry is whether the Defendant, Davis Forestry Corporation, is subject to the provisions of 7 U.S.C. § 2042 the Farm Labor Contractor Registration Act and 29 U.S.C. § 206 the Fair Labor Standards Act. The F.L.C.R.A. has been repealed and superseded by 29 U.S.C. § 1801 et seq., as amended January 14, 1983. However, inasmuch as the claims forming the basis of Plaintiffs' complaint herein arose on or about January 1977 and continued thru 1981, this Court will confine its statutory analysis to the pre-amended statute, 7 U.S.C. § 2042.

The Defendants adamantly contend that congressional intent and the definition sections of these respective statutes do not include the particular lumber industry of planting and injecting trees. Alternatively, Defendants contend that the definitions promulgated and accentuated by the Code of Federal Regulations via the Secretary of the Department of Labor lie in their favor and must be given great deference. Our analysis begins with the history of the Act.

THE FARM LABOR CONTRACTOR REGISTRATION ACT

The Farm Labor Contractor Registration Act (F.L.C.R.A.) as originally enacted in 1963 applied only to purely interstate transactions. In 1974 however, the Act was amended to reach intrastate transactions. Senate Report. (Labor and Public Welfare Committee) No. 93-1295, Nov. 21, 1974, reprinted in 1974 U.S. Code Cong. & Admin. News 6441 at 6446. The F.L.C.R.A. was obviously expanded in an effort to include a greater area of coverage for workers in the chain of cultivating and processing agricultural products. 1974 U.S. Code Cong. & Admin. News, supra at 6445-6446. Other pertinent amendments made to the definitions section in 1974 applied to the terms "agricultural employment" and "Farm Labor Contractor".

In 1974, the term "agricultural employment" in 7 U.S.C. § 2042(d) was expanded to read:

employment in any service or activity included within the provisions of section 203(f) of Title 29, or section 312(g) of Title 26 and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

The two statutory cross-references in § 2042 subdivision (d) are: first, to the definition of "agriculture" as used in the Fair Labor Standards Act, 29 U.S.C. § 203, and second, to a provision defining "agricultural labor" in the Internal Revenue Code, 26 U.S.C. § 3121(g). For the purpose of this research, analysis shall be confined to 29 U.S.C. § 203(f).

Section 203(f) of Title 29 provides us with the Fair Labor Standards Act definition of "Agriculture". In an attempt to corral the various types of agriculture, the definition states:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141(g) of Title 12), the raising of livestock,

> bees, fur bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Defendants read Congress' specially parenthesized portion of this provision in one light and one light only. The Defendants believe that it should be read conjunctively with the following phrase of "by a farmer or on a farm." (See Defendants' Brief in Support of Supplemental Motion for Partial Summary Judgment, p. 7). Consequently, Defendants would have this Court conclude that only a bona fide "farmer" pursuant to 29 C.F.R. § 780. 130 et seq., may be brought into Court under the Act; or in the alternative, that only persons planting and injecting trees on a "farm" pursuant to 29 C.F.R. § 780.137 et seq, are entitled to a remedy. To do so would defeat the very purpose of the F.L.C.R.A. Although this Court is fully cognizant of the Department of Labor's rational and well codified interpretations of these sections, the Court must nevertheless go beyond these seemingly concrete barriers to the very foundation of the Act itself and those it specifically intended to protect.

CONGRESSIONAL POLICY AND LEGISLATIVE HISTORY

Section 2041 of Title 7, too lengthy to quote en toto herein, provided in pertinent part:

> The Congress hereby finds that the channels and instrumentalities of interstate commerce are being used by certain irresponsible contractors for the services of the migrant agricultural laborers who exploit . . . migrant agricultural laborers and the public generally.

As further evidence of Congressional intent, this Court sought support in the grass roots reports from the Senate Labor and Public Welfare Committee, November 22, 1974. Senate Report No. 93-

1295 came as a result of joint efforts made by the House Committee on Education and Labor and the Senate Labor and Public Welfare Committee. Their joint purpose was unequivocally "to amend the F.L.C.R.A. of 1963 to provide for the extension of coverage and to further effectuate the enforcement of such Act . . . U.S.Code Cong. & Admin. New, supra at 6441.

This Report discussed the various unfortunate realities of the Act ranging from an alarming statistical analysis of non compliance with the statute, to the all too common problems of meager penalties and even weaker enforcement capabilities. To the more precise point at hand however, the report stated:

> The Committee has been informed by the Commissioner of the Immigration and Naturalization Service that some government agencies have permitted the employment of illegal aliens as tree planters, thinners, and other forest laborers by awarding contracts to forestry contractors who regularly employ aliens who have illegally entered the United States. The provisions of this bill and its penalties are intended to apply to such contractors. (emphasis added)

This Court is of the opinion that a more specific statement of intent could not be had. There can be no doubt that Congress must have intended to protect its migrant labor force and their respective jobs. Certainly if Congress intended to protect non citizens from the forestry and timber planting industry through umbrella coverage in the Act, it must follow that Congress most assuredly intended to protect those who have even far greater rights to be in this country. Therefore, this Court must accordingly grant greater weight to the intent of Congress and the Act's legislative history over the systematic deference to the Secretary of Labor's codified interpretation of words standing alone.

The Supreme Court has stated that a court should resolve any ambiguity in favor of the administrative construction, if such (emphasis added) construction enhances the general purposes of and policies underlying legislation. Zuber v. Allen, 396 U.S. 168. However, this Court finds that the Supreme Court by this very language allows a lower Court to disagree with an administrative agency when it deems

it has parted from and frustrated the very purpose of a Congressional enactment. The Fifth Circuit has also endorsed this very proposition. Charter Limousine, Inc. v. Dade County Board of Commissioners, 678 F.2d 586, 588 (5th Cir. Unit B) (1982); Coca Cola v. Atchison, Topeka, and Sante Fe Railway Co., 608 F.2d 213, 222, (5th Cir. 1979); Brennan v. Southern Contractor's Service, 492 F.2d 498, 501 (5th Cir. 1974); U.S. Pipe and Foundry Co. v. Webb, 595 F.2d 264, 272 at note 8 (5th Cir. 1979); Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414.

This Court is of the opinion that the aforementioned provisions of the Code of Federal Regulations are in discord with the language of the statute and the legislative history of the F.L.C.R.A.; and accordingly, finds that forestry laborers involved in planting and injecting trees must be accorded coverage under this statute.

THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (F.L.S.A.) claim is also encumbered with definitional conflict. The Defendants have advanced the same basic arguments that the Act does not apply to those engaged in the tree planting and injecting business.

Unlike the F.L.C.R.A. claim, this statute has a less circuitous definitional schema. It begins with 29 U.S.C. § 206. The statute provides:

> Every employer shall pay each of his employees who in any work week is engaged in commerce or in the production of goods for commerce, wages, at the following rates.

Subsection (5) of the Act is the applicable section for an agricultural laborer. This subsection provides:

> If such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

The final link needed to establish whether the Plaintiffs can seek refuge under F.L.S.A. is the determination of whether the Plaintiffs are precluded from recovery via the exemption statute.

This search leads us to 29 U.S.C. § 213(15).

Titled Exemptions, section 213(a) begins by stating that "the provisions of sections 29 U.S.C.§ 206 and 207 of this title shall not apply with respect to:". Albeit awkward, the language in subsection (a) is framed in the negative inasmuch as the statute thereafter contains a substantial amount of provisions that will qualify or disqualify potential plaintiffs. Among those provisions is 29 U.S.C. § 213(a)(15).

When read with section (a) above, this subsection becomes clearer and increasingly applicable. Therefore, it would read: The provisions of sections 206 and 207 of this title shall not apply with respect to:

> any employee employed in planting or tending trees, crusing, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed twelve. 29 U.S.C. § 213(a); 29 U.S.C. § 213(a)(15).

If it appears from the plain language of the statute, that the only determination left to be made is whether or not the Defendants hired more than twelve agricultural employees. This Court having been presented with facts indicating that the Defendants, Davis Forestry, are a multistate lumbering and forestry industry, our search is complete.

This Court finds that the Plaintiffs are entitled to protection and benefits of the Fair Labor Standards Act. Inasmuch as there can be no clearer language to a statute, this Court hereby affords Plaintiffs the benefits of this statute as the evidence may show them entitled.

Done at Brownsville, Texas this 19 day of March, 1984.

FILEMON B. VELA
United States District Judge

APPENDIX G

Administrator

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

RAFAEL C. AGUIRRE, et al,	*	
Plaintiffs,	*	
	*	
	*	CIVIL ACTION NO. B-81-142
v.	*	
	*	
DAVIS FORESTRY	*	
CORPORATION, and	*	
JUAN SALDANA,	*	
Defendants	*	

Entered March 13, 1987

ORDER

The Court has reviewed the Magistrate's Report and Recommendation which is hereby adopted.

It is therefore ORDERED that the defendant Davis Forestry Corporation's Renewed Motion for Partial Summary Judgment be GRANTED in that the Farm Labor Contractor Registration Act does not apply to parties engaged exclusively in forestry activities.

The Clerk will send copies of this Order to counsel for the respective parties.

Done at Brownsville, Texas, this 13th day of March, 1987.

s/ FILEMON B. VELA
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

BROWNSVILLE DIVISION

RAFAEL C. AGUIRRE, et al, Plaintiffs,	*	
v.	*	CIVIL ACTION NO. B-81-142
DAVIS FORESTRY CORPORATION, and JUAN SALDANA, Defendants	*	

Entered December 3, 1986

MAGISTRATE'S REPORT AND RECOMMENDATION

Presently before the Court is Davis Forestry Corporation's (Davis Forestry) Renewed Motion for Partial Summary Judgment pursuant to Fed. R. Civ. P. 56. Davis Forestry bases this motion on two grounds: first, that it could not have intentionally violated the Farm Labor Contractors Registration Act (FLCRA), formerly 7 U.S.C. §§ 2041-2053, now 29 U.S.C. §§ 1801-1872, because it was told by state and federal officials that forestry activities were excluded from the provisions of the FLCRA; and second, that forestry activities are not covered by the FLCRA. Whether summary judgment is appropriate based on either of these two grounds is the subject of this Report and Recommendation.

"Summary judgment is appropriate only if it appears from the pleadings and supporting documentation that (1) no genuine dispute as to material facts exists, and (2) such facts would entitle the moving party to judgment as a matter of law." Fed. R. Civ. P. 56(c); Stafford

v. United States, 611 F.2d 990, 993 (5th Cir. 1980). It should be noted that the burden is on the movant to establish his right to summary judgment and any doubt must be resolved against him. Id. at 993; Alabama Farm Bureau Mutual Casualty Co. v. American Fidelity Life Insurance Co., 606 F.2d 602 (5th Cir. 1979).

In the instant case, Davis Forestry first contends that the FLCRA permits awarding damages only against parties who intentionally violate its provisions. This is supported by 7 U.S.C. § 2050a(b) which states in part:

> If the Court finds that the respondent has intentionally violated any provisions of this chapter or any regulation prescribed hereunder, it may award damages. . . .

See also 29 U.S.C. § 1854(c)(1).

Davis Forestry supports its claim that it did not intentionally violate the FLCRA through affidavits of its officers and official of the United States Department of Labor, and through letters from itself to the Texas Department of Labor Standards and a response thereto. These exhibits reveal that Davis Forestry was told by both state and federal officials that its activities did not bring it within the coverage of the FLCRA. Furthermore, Davis Forestry also claims to have relied on regulations which it interprets to specifically exclude employers engaged exclusively in forestry or lumbering activities from the coverage of the FLCRA. See 29 U.S.C. § 203(f); 29 C.F.R. § 780.200.

These arguments in support of its first ground on which it bases its motion for summary judgment seem tenable at first blush. However, when viewed against the standard set for ruling on summary judgment claims I find that to grant summary judgment based on Davis Forestry's claim that they did not have the intent to violate the FLCRA would be inappropriate. This is because "[c]ases in which the underlying issue is one of motivation, intent, or some other subjective fact are particularly inappropriate for summary judgment, as are those in which the issues turn on the credibility of the affiants." Slavin v. Curry, 574 F.2d 1256, 1267 (5th Cir. 1978) (quoting Conrad v. Delta Airlines, Inc., 494 F.2d 914, 918 (7th Cir. 1974); Staffo rd v. United States, 611 F.2d at 993. Based upon this

reasoning I respectfully recommend that Davis Forestry's first basis for its motion for partial summary judgment, that it did not intentionally violate the FLCRA, be denied.

On the other hand, Davis Forestry's second basis for summary judgment relief, that forestry activities are not covered by the FLCRA, is an appropriate issue to be decided on summary judgment. The issue of law to be resolved is whether the FLCRA applies to parties who engage exclusively in forestry activities.

This issue has been extensively briefed and this Court has already issued one Report and Recommendation on this point. Initially Judge Vela issued a interlocutory memorandum subject to reconsideration, stating that the FLCRA applied to forestry contractors. This determination was based on an extensive look at the statute's legislative history and a finding that Congress intended forestry contractors to be covered by the FLCRA just as other agricultural contractors. Thereafter, I issued a Report and Recommendation recommending that the District Court reconsider its memorandum on this point because the language of the FLCRA is clear and unambiguous that forestry activities are not covered by its provisions and therefore reliance on the legislative history was improper. On July 19, 1985, Judge Vela issued an Order adopting my Report and Recommendation on this point, and on November 6, 1985, a hearing was held on the issue for purposes of having a record for appeal.

Since this time the Oregon District Court filed a decision contrary to my Report and Recommendation of October 24, 1984. I feel compelled to consider Davis Forestry's Motion for Partial Summary Judgment in light of that decision. Therefore, the sole issue before the Court once again is whether forestry activities are covered by the FLCRA.

The FLCRA extends coverage only to those engaged in "agricultural employment." Therefore, the task before the Court is to define the boundaries of that term and determine whether forestry activities fall within those boundaries.

As defined in 29 U.S.C.§ 1802(3) "agricultural employment" means:

> employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 023(f)(, or section 3121(g) of Title 26 and the handling, planting,

drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

(Emphasis indicates the portion added by the 1974 amendments.)

Section 3(f) of the Fair Labor Standards Act of 1938 reads:

> "Agriculture" includes farming in all its branches among other things includes the cultivation and tillage of the soil. dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . the raising livestock, bees, fur-bearing animals, or poultry, and any practices (includ ing any forestry or lumbering operations) performed by a farmer on a farm as an incident to or in conjunction with such farming operations . . .

29 U.S.C. § 203(f) (emphasis added).

From reading these two statutes together it is clear that forestry or lumbering activities are not included within the definition of "agricultural employment" unless they are performed by a farmer on a farm. Otherwise forestry activities are excluded from the coverage of the FLCRA. Review of the definition of "agricultural labor" in section 3121(g) of Title 26 and of the regulations promulgated under the FLCRA, the Fair Labor Standards Act (FLSA), and the Internal Revenue Code (IRC) do not lead to a different conclusion. In fact, the regulations under section 3(f) of the FLSA read in pertinent part:

> Employment in forestry or lumbering operations is expressly included in agriculture if the operations are performed "by a farmer on a farm as an incident to or in conjunction with such farming operation." While "agriculture" is sometimes used in a broad sense as including the science and art of cultivating forests the language quoted in the preceding sentence is a limitation on the forestry and lumbering operations which will be considered agricultural for purposes of section 3(f). It follows that employees of an employer engaged exclusively in forestry or lumbering operations are not considered agricultural

employees.

29 C.F.R. § 780.200 (emphasis added).

This language and the definition of "agricultural employment" itself is clear and unambiguous. Forestry or lumbering operations are not covered by the FLCRA unless they are performed "by a farmer on a farm as an incident to or in conjunction with such farming operations."

Where, such as here, the language of a statute is clear and unambiguous it is unnecessary to look towards the legislative history for help in devining legislative intent. Not only is it unnecessary, it would be improper to do so. Ingalls Shipbuilding Division, Litton Systems, Inc. v. White, 682 F.2d 275, 289 (5th Cir. 1982); United States v. Oregon, 366 U.S. 643, 648, 81 S.Ct. 1278, 1281, 6 L.Ed2d 575 (1961). For when the language of a statute is clear and unambiguous then that language is conclusive of legislative intent which is the controlling principal in statutory construction. Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 64 L.Ed2d 766 (1980); James v. United States, 760 F.2d 590, 593 (5th Cir. 1985) (en banc).

Therefore, based upon the language of the statute itself I find that forestry activities, such as those engaged in by Davis Forestry, are not covered by the FLCRA. Two other significant factors support this conclusion.

First, "we are obliged to defer to reasonable interpretation of a statute by an agency charged with its administration." Almendarez v. Barrett-Fisher Co., 762 F.2d 1275, 1281 (5th Cir. 1985); Soliz v. Plunkett, 615 F.2d 272, 276 (5th Cir. 1980); See Chemical Manufacturers Ass'n v. Natural Resources Defense Council, __ U.S. , __, 105 S.Ct. 1102, 1108, 84 L.Ed.2d 90 (1985). The Department of Labor is charged with the administration of the FLCRA. Furthermore, a "reasonable agency interpretation of a statute is of particularly great weight if the agency assisted in drafting the statute." Almendarez, 762 F.2d at 1281 n. 3; Miller v. Youakim, 440 U.S. 125, 144, 99 S.Ct. 957, 968-69, 59 L.Ed2d 194 (1979). The Department of Labor was involved in drafting the 1974 amendments to the FLCRA which added to the definition of "agricultural employment." S. Rep. No. 93-1295, 93rd Cong., 2d Sess. (1974), reprinted in [1974] U.S. Code Cong. & Adm. News 6441, 6445.

The Labor Department's interpretation of the FLCRA has

never included forestry activities within the definition of "agricultural employment." The Labor Department has refused to include forestry activities within this definition because of the specific exclusion from coverage granted to parties engaged exclusively in forestry activities by the FLSA, section 3(f), and because section 3(f) of the FLSA is explicitly adopted into the definition of "agricultural employment" found in the FLCRA. This interpretation is reasonable and should be afforded particularly great weight when interpreting FLCRA.

Second, interpreting the definition of "agricultural employment", particularly the portion added by the 1974 amendments, to include within the FLCRA's coverage those engaged exclusively in forestry or lumbering operations would create an inconsistency within that definition which would make the limitation adopted from § 3(f) of the FLSA meaningless. In other words, extending coverage of the FLCRA to all forestry or lumbering activities would in effect repeal by implication the limitation found in § 3(f) of the FLSA which extends FLCRA coverage only to those forestry or lumbering operations performed by a farmer on a farm.

It is abundantly clear that such repeal by implication is disfavored by law. Columbia Gas Development Corp. v. Federal Energy Regulatory Commission, 651 F.2d 1146 (5th Cir. 1985). Implied repeal of one provision of a statute by a later amendment to that statute will be found only when the earlier and later provisions are irreconcilable. Id.; Morton v. Mancari, 417 U.S. 535, 550, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974); Kremer v. Chemical Construction Corp., 456 U.S. 461, 467, 102 S.Ct. 1883, 1890, 72 L.Ed.2d 262 (1983). Such is not the case here. The limitation which brings only those forestry activities engaged in by a farmer on a farm within the definition of "agricultural employment" can be reconciled with the language added by the 1974 amendments.

Such reconciliation simply requires broadening the definition "vertically" rather than both "vertically" and "horizontally", to use the terms applied by the court in Bresgal v. Brock, 637 F.Supp. 271, 274-75 (D.C. Ore. 1985). Put another way, the addition of the phrase "the handing, planting drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state" would act to extend FLCRA coverage to the various steps in the production chain

of products previously covered under the FLSA and IRC definitions. Thus, for example, where the FLCRA prior to the 1974 amendments would have covered contractors supplying labor to pick tomatoes, the new language would extend coverage to contractors supplying migrant labor to the tomatoe cannery. Bresgal, 637 F.Supp. at 275. To also broaden the definition of "agricultural employment" "horizontally", to growing operations not previously covered by the FLCRA would not be appropriate. As noted, such interpretation would conflict with the plain language of § 3(f) of the FLSA which was incorporated by reference into the definition of "agricultural employment". Limiting the effect of the 1974 amendments to "vertical" growth not only renders the definition of "agricultural employment" internally consistent, but also comports with the interpretation given it by the Department of Labor for the past twelve years.

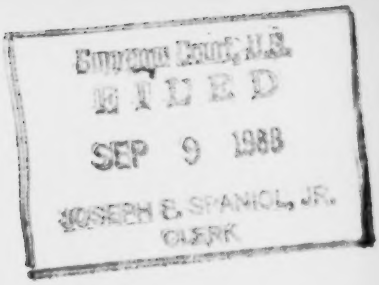
Therefore, based on the foregoing I respectfully recommend that Davis Forestry's second basis for summary judgment relief, that forestry activities such as those engaged in by Davis Forestry are not covered by the FLCRA, be granted.

In making this recommendation I am not unaware that those engaged exclusively in forestry or lumbering operations often recruit migrant workers in exactly the same way as those engaged in traditional agricultural employment. I also recognize that workers of forest labor contractors may be the victims of the abusive practices that the FLCRA was designed to prevent. However, the plain language of the FLCRA itself demands such a recommendation, and it would be beyond this Court's jurisdiction to encroach upon the legislative responsibilities granted to Congress by the Constitution.

The Clerk will send copies of this Magistrate's Report and Recommendation to all parties who have ten (10) days from receipt hereof to file written objections thereto, pursuant to General Order 80-5. Failure to file written objections within this ten day period shall bar an aggrieved party from attacking the factual findings on appeal.

Done at Brownsville, Texas, this 3rd day of December, 1986.

s/ WILLIAM M. MALLET
UNITED STATES MAGISTRATE



(4)

No. 88-164

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE WEYERHAEUSER COMPANY, Petitioner

v.

RUBEN BRACAMONTES, REYES PEREZ and
PABLO MARTINEZ, Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

Myron Timothy Boe
Jim Hunter Birch
Rose Law Firm
A Professional Association
120 East Fourth Street
Little Rock, AR 72201
(501) 375-9131

ATTORNEYS FOR PETITIONER

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SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

This Supplemental Petition is to advise the Court of certain recent events relating to this case.

At issue in this case is whether the Fifth Circuit Court of Appeals acted properly in expanding coverage under the Migrant and Seasonal Agricultural Workers' Protection Act ("MSPA") 12 U.S.C. § 1801, et seq. to workers engaged exclusively in forestry contrary to the plain language of the statute and long-standing agency interpretation.

The Fifth Circuit reasoned that exclusion of forestry from MSPA coverage was inconsistent with the Act's purpose of preventing farm labor contractor exploitation of migrant and seasonal laborers. In contravention of this reasoning, Petitioner/Defendant Weyerhaeuser notes that long-standing remedial labor standards acts, such as the Fair Labor Standards Act and National Labor Relations Act include forestry workers, but not agricultural workers. Thus, forestry workers have available remedies from which agricultural workers are precluded. See Petition for Writ of Certiorari at 9.

Weyerhaeuser brings to the Court's attention a recent appropriations bill in which Congress elects to retain a clause excluding funds for the National Labor Relations Board from being used in connection with agricultural labor. See 134 Cong. Rec. H4269 (daily ed. June 15, 1988). The proviso states:

> Provided, That no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of the Act of July 5, 1935 (29

> U.S.C. 152), and as amended by the Labor-Management Relations Act, 1947, as amended, and as defined in section 3(f) of the Act of June 25, 1938 (29 U.S.C. 203), and including in said definition employees engaged in the maintenance and operation of ditches, canals, reservoirs, and waterways when maintained or operated on a mutual, nonprofit basis and at least 95 per centum of the water stored or supplied thereby is used for farming purposes.

Thus, Congress continues to exclude agricultural workers from coverage under the National Labor Relations Act, while forestry workers continue to be covered. The continued distinction between "agricultural" and "forestry" for purposes of NLRA coverage is persuasive of Congress' intention to retain such distinction for purposes of MSPA coverage.

Respectfully submitted,

ROSE LAW FIRM
A Professional Association
120 East Fourth Street
Little Rock, Arkansas 72201
(501) 375-9131

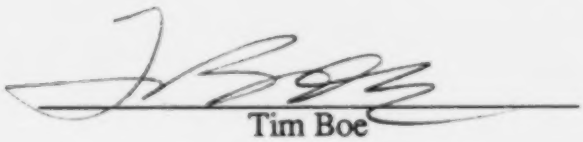
By:

Tim Boe
Jim Hunter Birch

Walter Passmore
EWERS, TOOTHAKER,
EWERS, ABBOTT, TALBOT,
& HAMILTON
1111 Nolana
P.O. Box 3670
McAllen, Texas 78501

CERTIFICATE OF SERVICE

I, Tim Boe, do hereby certify that I mailed a copy of the above and foregoing Supplemental Petition to Marc Linder, Texas Rural Legal Aid, Inc., 259 South Texas, Weslaco, Texas 78502; Ronald Hole, Atlas & Hall, P.O. Drawer 3725, McAllen, Texas 78502; and Walter Passmore, Ewers, Toothaker, Ewers, Abbott, Talbot, & Hamilton, 1111 Nolana, P.O. Box 3670, McAllen, Texas 78501, on this 2 day of September, 1988.



Tim Boe